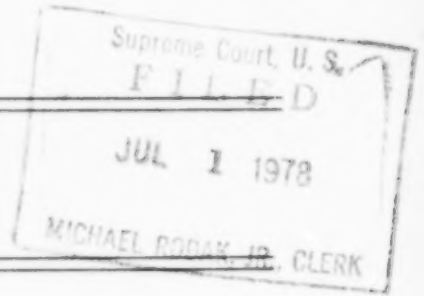

Appendix.



**In the
Supreme Court of the United States.**

OCTOBER TERM, 1978.

No. 77-69.

ALAN MACKEY,
REGISTRAR OF MOTOR VEHICLES OF THE
COMMONWEALTH OF MASSACHUSETTS,
APPELLANT,

v.

DONALD E. MONTRYM ET AL.,
APPELLEES.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS.

Docketed July 12, 1977.
Probable Jurisdiction Noted April 17, 1978.

Table of Contents.

Docket entries	1
Complaint	6
Exhibit A	13
Exhibit B	16
Exhibit C	18
Exhibit D	21
Order, dated July 7, 1976	22
Restraining order, dated July 9, 1976	23
Order, dated November 17, 1976	24
Answer	25
Agreed statement of facts and documents	28
Exhibit A	32
Exhibit B	33
Exhibit C	40
Exhibit D	42
Exhibit E	44
Exhibit F	46
Exhibit G	47
Exhibit H	48
Exhibit I	49
Exhibit J	50
Plaintiff's motion for partial summary judgment	53
Judgment, dated April 4, 1977	55
Defendant's motion for entry for judgment	56
Clarification of April 4, 1977, judgment	57
Defendant's notice of appeal	58

Plaintiff's motion for contempt order	59
Final judgment, dated May 4, 1977	63
Defendant's notice of appeal	65
Defendant's motion for stay of judgment and order	66
Defendant's motion for relief from judgment	75
Defendant's motion for reconsideration of his prior motions (1) to stay judgment; (2) to modify judgment	77
Memorandum, dated October 6, 1977	78

UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF MASSACHUSETTS.

DONALD E. MONTRYM, INDIVIDUALLY
AND IN BEHALF OF ALL OTHERS
SIMILARLY SITUATED,
Plaintiff

CIVIL ACTION
No. 76-2560-F

v.

ROBERT A. PANORA, REGISTRAR OF
MOTOR VEHICLES, AND HIS SUCCESSORS
IN OFFICE,
Defendant

Docket Entries.

1976

July

- 2 Complaint filed (request for three-judge court)
Motion for temporary restraining order filed.
Memorandum in support of plaintiff's motion for TRO filed.
Motion for appointment of special process server filed.
- 7 *FREEDMAN, J.* Re motion for appointment of special process server-"ALLOWED".
Summons issued.
FREEDMAN, J. ORDER ENTERED . . . it may be that the result in this case so clearly obtains as to obviate the requirement for a three-judge court. The parties are invited to submit memoranda on this issue within 21 days of the date of this order.
cc/cl.

1976

July

- 9 Motion for temporary restraining order
FILED (ASSENTED TO).

FREEDMAN, J. 2:30 P.M. RESTRAINING
ORDER ENTERED . . . are enjoined from
revoking Donald E. Montrym's driver's
license . . . cc/cl.

- 12 Letter dated July 9, 1976 from plaintiff's
counsel re three-judge court.

November

- 17 *FREEDMAN, J.* ORDER ENTERED . . . a
three-judge court having been convened, it
is ordered that a hearing on the merits be
held before the U.S. District Court on
Wednesday, December 15, 1976 at 2 PM
. . . it is further ordered that the parties
herein file a stipulation of undisputed facts
and relevant documents on or before
Dec. 1, 1976 and the parties herein submit
their memoranda of law no later than
Dec. 8, 1976. Counsel are directed to file
all papers in quadruplicate cc/cl.

- 23 P's motion to certify class FILED CS

December

- 3 Appearance of Steven A. Rusconi as counsel
for defendant FILED
D's motion for continuance of hearing on
merits FILED cs
6 Letter from plaintiff's counsel stating no
objection to request for continuance.
Defendant's motion to file answer late
FILED CS

1976

December

- 6 Deft's Answer filed. c/s

1977

January

- 5 Memorandum of law in support of judgment
for defendant FILED cs

- 11 Plaintiff's motion for a preliminary injunc-
tion FILED

Plaintiff's motion for partial summary judg-
ment with attached affidavit FILED

Agreed statement of facts with attached ex-
hibits FILED

- 12 Plaintiff's brief in support of his motion for
a preliminary injunction and partial sum-
mary judgment FILED CS

FREEDMAN, J. Hearing on the merits for
partial summary judgment and prelimi-
nary injunction; arguments; TAKEN
UNDER ADVISEMENT.

- 14 Corrected copies of plaintiff's brief in sup-
port of his motion for a preliminary in-
junction and partial summary judgment
FILED cs

March

- 25 *FREEDMAN, J., TAURO, J.* OPINION EN-
TERED. cc/cl., West, Mass Lawyers
CAMPBELL, J., DISSENTING OPINION
ENTERED, cc/cl., West, Mass Lawyers

1977

April

- 4 *FREEDMAN, J., TAURO, J.* JUDGMENT ENTERED . . . this matter came on for hearing for summary judgment on the issue of the constitutionality of MGL C90 § 24(1)(f). The case having been duly argued by counsel and a decision having been rendered in an opinion filed March 25, it is hereby ordered, adjudged and decreed that the plaintiff's motion be granted. cc/cl
- 8 Deft's motion for entry of judgment filed CS Memorandum of law in support of deft's motion for entry of judgment FILED CS
- 12 *FREEDMAN, J., TAURO, J.* Clarification of 4/4/77 judgment, filed, copies to counsel.
- Deft's Notice of Appeal to the Supreme Court filed. c/s
- 14 Ltr from Mr. Hagopian to Clerk requesting judgment be entered, filed.
- 18 P's motion for Contempt Order filed.
- 20 Certified copy of docket entries and pleadings forwarded to the United States Supreme Court.

October

- 6 *TAURO, D.J.* MEMORANDUM ENTERED (signed by Freedman, J., Tauro, J.)
CAMPBELL, C.J. Dissenting memorandum entered. West, Mass Lawyers, cc/cl.
FREEDMAN, J., TAURO, J. ORDER ENTERED . . . in accordance with the

1977

October

- 6 memorandum issued today, the court ORDERS that the defendant's motion for reconsideration of its previous motions to stay judgment and to modify judgment is denied. The court further orders that the judgment in favor of the plaintiff entered on May 4, 1977 remain in effect. cc/cl. West, Mass Lawyers

November

- 7 Letter dated Nov. 3, 1977 from Plaintiff's counsel to Clerk explaining mailing of memorandum dated October 6, 1977 to Supreme Court.

December

- 8 Original pleadings returned from the Supreme Court.

1978

April

- 21 ORDER DATED APRIL 17, 1978 from Clerk, Supreme Court of the United States: "Appeal from the United States District Court for the District of Massachusetts The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted."
-

UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF MASSACHUSETTS.

[Title omitted in Printing.]

Complaint.

CAUSE OF ACTION AND JURISDICTION

1. This action arises under 42 USC 1983 and jurisdiction is predicated under 28 USC 1343(3).

PARTIES

2A. Plaintiff, Donald E. Montrym, is a resident of Acton, Massachusetts, and a citizen of the United States.

2B. Plaintiff Montrym brings this action on behalf of all persons similarly situated pursuant to Rule 23(a) and (b)(2). The class action allegations are set out more fully in paragraphs 16-22 infra.

3. The defendant is Robert A. Panora, Registrar of Motor Vehicles of the Commonwealth of Massachusetts, and his successors in office.

THREE JUDGE COURT

4. Plaintiff requests a three-judge court be convened pursuant to 28 USC 2281-2284.

FACTS

5. On May 15, 1976, the plaintiff was involved in an automobile accident in Acton. Shortly thereafter, at 8:30 p.m., an Acton police officer arrived at the scene of the accident. He arrested the plaintiff and charged him with driving under the influence of intoxicating liquors, an offense set out under G.L. Ch. 90 § 24(1)(a).

6. The plaintiff was brought to the Acton police station and asked whether he wanted to submit to a breathalyzer test. He was not advised that his driver's license would be suspended for ninety days if he refused to take the test. He refused.

7. At 9:05 p.m., the plaintiff's attorney, Richard B. Harris, Esq., arrived at the Acton police station, and upon his advice, the plaintiff requested the police to administer the breathalyzer test. The Acton police refused to give plaintiff the breathalyzer test. The plaintiff and his attorney repeated the request again and it was denied.

8. On June 8, 1976, the plaintiff was charged in District Court of Central Middlesex with driving under the influence of intoxicating liquors, an offense under G.L. Ch. 90 24(1)(a), and after a trial the complaint was dismissed. In addition, the district court entered a specific finding: "Breathalyzer refused when requested within 1/2 hour arrival at [the police] station". A certified copy of the record of the district court proceedings marked exhibit A is attached and incorporated herein.

9. Anticipating some action, plaintiff's attorney, Richard B. Harris, Esq., wrote the defendant Registrar on June 2, 1976 and informed him that the criminal complaint against the plaintiff was dismissed by the District Court of Central Middlesex, and enclosed an affidavit by the plaintiff verifying his request of the Acton police to take the breathalyzer

test. Plaintiff's attorney requested a stay of any action by the Registrar.

10. On June 10, 1976, the plaintiff's driver's license was suspended by the defendant for a period of ninety days for refusing to submit to a chemical test, i.e., the breathalyzer, pursuant to G.L. Ch. 90 § 24(1)(f) which reads:

(f) Whoever operates a motor vehicle upon any way or in any place to which the public has right of access, or upon any way or in any place to which members of the public have access as invitees or licensees, shall be deemed to have consented to submit to a chemical test or analysis of his breath in the event that he is arrested for operating a motor vehicle while under the influence of intoxicating liquor. Such test shall be administered at the direction of a police officer, as defined in section one of chapter ninety C, having reasonable grounds to believe that the person arrested has been operating a motor vehicle upon any such way or place while under the influence of intoxicating liquor. If the person arrested refuses to submit to such test or analysis, after having been informed that his license or permit to operate motor vehicles or right to operate motor vehicles in the commonwealth shall be suspended for a period of ninety days for such refusal, no such test or analysis shall be made, but the police officer before whom such refusal was made shall immediately prepare a written report of such refusal. Such written report of refusal shall be endorsed by a third person who shall have witnessed such refusal. Each such report shall be made on a form approved by the registrar, and shall be sworn to under the penalties of perjury by the police officer before whom such refusal was made. Each such report shall set forth the grounds for the officer's

belief that the person arrested had been driving a motor vehicle on any such way or place while under the influence of intoxicating liquor, and shall state that such person had refused to submit to such chemical test or analysis when requested by such police officer to do so. Each such report shall be endorsed by the police chief, as defined in section one of chapter ninety C, or by the person authorized by him and shall be sent forthwith to the registrar. Upon receipt of such report, the registrar shall suspend any license or permit to operate motor vehicles issued to such person under this chapter or the right of such person to operate motor vehicles in the commonwealth under section ten for a period of ninety days. [Amended by St.1972, c. 488, § 2.]

A copy of the defendant's suspension notice marked exhibit B is attached and incorporated herein.

11. The plaintiff mailed his driver's license #052223814 to the Registrar who in turn received it on June 8, 1976.

12. On June 11, 1976, the defendant replied to plaintiff's attorney:

In reference to your letter of June 2, 1976 concerning the above-named [Donald E. Montrym], this is to advise you that his license has already been suspended and said license must be returned to this office immediately.

Very truly yours,

[s] Robert A. Panora
Registrar

13. On June 25, 1976, the plaintiff by his attorney, Robert W. Hagopian, made demand for the return of his license. A copy of this demand marked exhibit C is attached and incorporated herein. The Registrar has refused to return plaintiff's license.

14. The plaintiff depends upon his license for his livelihood. An affidavit in support thereof marked exhibit D in support thereof is attached and incorporated herein.

15. The plaintiff maintains that G.L. Ch. 90 § 24(1)(f) is unconstitutional on its face and as applied in that it deprives him of his driver's license, a valuable property right, without due process in that plaintiff was denied a presuspension hearing. See *Bell v. Burson*, 402 U.S. 535, 542; *Cicchetti v. Lucey*, 376 F. Supp. 215 (D. Mass. 1974), reversed on other grounds 514 F.2d 362 (1974); *Pollard v. Panora*, ____ F. Supp. ____; *Warner v. Womberta*, 348 F. Supp. 1068, aff'd 410 U.S. 919 and in particular *Holland v. Parker*, 354 F. Supp. 196 (three-judge court DSD 1973).

CLASS ACTION

16. This action is brought pursuant to Rule 23(a) and (b)(2) of Federal Rules of Civil Procedure.

17. Plaintiffs constitute the class of those persons whose Massachusetts license to operate motor vehicles has been suspended by the defendant or his predecessors or successors in office pursuant to Massachusetts General Laws, Chapter 90 § 24(1)(f) prior to an opportunity for hearing on such suspension.

18. The members of the class are so numerous as to make joinder impractical. To join all members of the class would be extremely difficult and inconvenient.

19. The question of law common to the class is the constitutionality of G.L. Ch. 90 § 24(f).

20. The claim of the plaintiff Montrym is identical to the claim of the class, i.e., suspension of a driver's license without a hearing pursuant to G.L. Ch. 90 § 24(1)(f).

21. The interest of plaintiff Montrym's claim does not conflict with the claims of the members of the class. Plaintiff's attorney's practice compromises a substantial amount of litigation in the area of constitutional rights.

22. The defendant's conduct in suspending licenses without a hearing pursuant to G.L. Ch. 90 § 24(1)(f) is uniform to the class and final injunctive and/or declaratory relief as requested infra is appropriate with respect to the class as a whole.

RELIEF

23. Declare G.L. Ch. 90 § 24(1)(f) unconstitutional on its face or as applied to plaintiff.

24. Plaintiff Montrym prays this court for a temporary order restraining the suspension of his driver's license. A copy of a proposed restraining order is attached. (Plaintiff's attorney notified defendant's attorney, Robert Kelley, Esq., that he would seek this action, including the time and place).

25. Plaintiff prays this court for a preliminary and permanent injunction barring the defendant from enforcing G.L. Ch. 90 § 24(1)(f) and barring the defendant from suspending plaintiff's license.

26. Plaintiff Montrym prays that damages be awarded him in the amount of two hundred and fifty (\$250) dollars per day for each day that his driver's license has been suspended.

27. Plaintiff Montrym prays that punitive damages in the amount of \$5,000 be awarded.

28. Plaintiff Montrym prays that reasonable attorney's fees be awarded.

29. Plaintiff prays such further relief as this court deems just and proper.

By his attorney,
ROBERT W. HAGOPIAN.
Co-Counsel
RICHARD BATES HARRIS.

EXHIBIT A.

COMMONWEALTH OF MASSACHUSETTS.
DISTRICT COURT OF CENTRAL MIDDLESEX.

COMMONWEALTH,

vs.

DONALD E. MONTRYM

VIOLATION OF MOTOR VEHICLE LAW

OPERATING MV.V UNDER INF. INTOX. LIQ. General
Laws, Chapter 90, Section 24.

Penalty: Fine not less than \$35. nor more than \$1,000., or
imprisonment not less than 2 weeks nor more than 2 yrs., or
both such fine & imprisonment.

ARREST 5-17-76

DEFT. NOTIFIED OF RIGHT TO HAVE COUNSEL
_____ J.

Atty. Bates filed app — plea NG C. 6-2-76

5-28-76 Motion to Suppress & affidavit filed

FORTE, J.

Dismissed. Breathalyzer refused when requested within
½ hr of arrest at station. See affidavit & memorandum.

GELINAS, J.

*To the District Court of Central Middlesex,
in the County of Middlesex.*

George W. Robinson of Acton in said County, in behalf of the Commonwealth of Massachusetts, on oath, complains that Donald E. Montrym of Acton on 5-15-76 at Acton aforesaid upon a way or in a place to which the public has a right of access, or upon a way or in a place to which members of the public have access as invitees or licenses, did operate a motor vehicle while under the influence of intoxicating liquor against the peace of said Commonwealth and contrary to the form of the Statute in such case made and provided.

GEORGE W. ROBINSON,
Complainant.

Received and sworn to 5-17-76 before said Court.

EDWARD F. SULESKY,
Assistant Clerk of said Court.

*At the District Court of Central Middlesex, holden at
Concord, within the County of Middlesex, for the trans-
action of Criminal Business.*

George W. Robinson of Acton in the County of Middlesex, complainant and Donald E. Montrym of Acton in the County of Middlesex, defendant.

Complaint for operating a motor vehicle under the influence, G.L. ch 90:24.

I hereby certify that the above entitled complaint was duly entered in said Court on the 17th day of May A.D. 1976.

That on the 17th day of May A.D. 1976, the said defendant is arraigned in said Court upon said complaint, that he is asked by the Court whether he is guilty or not guilty of the allegations contained in said complaint, and the said defendant pleads and says that he is not guilty, and the hearing thereon is then and there continued from time to time to the second day of June A.D. 1976, on which day trial is had and the Court thereupon dismissed the complaint.

IN TESTIMONY that the foregoing is a true copy of record in the case of the Commonwealth vs. DONALD E. MONTRYM from the records of said Court, together with an attested copy of the complaint, I hereunto subscribe my name and affix the seal of said Court, at Concord aforesaid, this 25th day of June A.D. 1976.

Attest: _____
Clerk of said Court.

* 1X You were convicted of violation of Section 24B of Chapter 90.
 * 2A Pending an investigation, it appears that a motor vehicle operated by you was involved in an accident that resulted in a death.
 * 2B You failed to notify a property damage judgment.
 * 2C You defaulted a court summons.
 * 2E Failure to pay a motor vehicle Excise tax.
 * 2G You were issued three warning citations in one year.
 * 2L ~~You refused to submit to a chemical test~~
 You have been designated an habitual traffic offender.
 * 2K You incurred a bad check.
 2P You committed a violation of the motor vehicle laws of a nation which gives no reason to believe that your continued operation would be so seriously improper as to constitute an immediate threat to the public safety.
 You are entitled to a hearing within 30 days.
 3U I have reason to believe that you are an incompetent person to operate motor vehicles (lack of ability, legal qualification or fitness to operate or register a motor vehicle).
 3C I have reason to believe that you did improperly operate a motor vehicle.
 3D You, a minor, were convicted or adjudged delinquent of transporting an alcoholic beverage.
 3O 1 You, a minor, were transporting an alcoholic beverage.
 3O 2 You were adjudged a delinquent child (chapter 119, section 58B).
 3E You are on a probation on a violation of the motor vehicle or related laws.
 3G You failed to file a report of an accident as required by law.
 3H I have determined that your motor vehicle or trailer is improperly equipped or otherwise unfit to be operated.
 3J You did allow your motor vehicle to be operated in violation of the laws and regulations pertaining to motor vehicles.
 3K You were convicted of disposing of garbage in violation of statute.
 3L You were convicted of abandoning a motor vehicle.
 3M You were convicted of a fraudulent claim.
 3N You were convicted of not displaying plates.
 3P You failed to notify the registrar of a change of name, or address or mail address within 30 days.
 You have failed to file security in accordance with the provisions of general laws, chapter 90, section 30.

EXHIBIT C.

June 25, 1976

Mr. Robert A. Panora
 Registrar of Motor Vehicles
 100 Nashua Street
 Boston, Massachusetts

Dear Sir:

Please be advised that I represent Mr. Donald Montrym, 417 Arlington Street, Acton, Massachusetts; date of birth April 10, 1930; Massachusetts license no. 052223814. On June 7, 1976, you suspended Mr. Montrym's license for ninety days for refusal to submit to a breathalyzer/test out of an incident occurring on May 15, 1976 and in accordance with G.L. Ch. 90 § 24(1)(f). See your file no. DL 07017.

Please be advised that Mr. Montrym did not refuse to submit to a breathalyzer test on May 15, 1976 and that he was acquitted of driving under the influence of intoxicating liquors, G.L. Ch. 90 § (1)(a), on June 2, 1976, complaint no. 4703 in the District Court of Central Middlesex. In addition, the district court made a specific finding on the face of complaint that the police refused to give Mr. Montrym a breathalyzer test after he requested one. This finding is binding upon you. See *Ashe v. Swenson*, 397 U.S. 436 (1970).

Mr. Montrym depends upon his driver's license for his livelihood. Notwithstanding G.L. Ch. 90 § 24(1)(g), your action in suspending his license without affording him a prior hearing is a patent deprivation of his liberty and property without due process and is in contravention of the

Fourteenth Amendment of the United States Constitution. See *Cicchetti v. Lucey*, 337 F. Supp. 215 (1974); and *Pollard v. Panora*, ____ F. Supp. ____ (D. Mass. 1976).

Demand is hereby made upon you to immediately reinstate Mr. Montrym's driver's license. If you do not take this action and notify me accordingly by 9:30 a.m., Wednesday, June 30, 1976, I will appear in the federal district court for the district of Massachusetts and request that a restraining order be issued against you from continuing to suspend Mr. Montyrm's license. I am also going to request the court to award actual and punitive damages.

Very truly yours,

ROBERT W. HAGOPIAN

RWH:hfc

cc: Richard Harris, Esq., Co-Counsel
 Robert Kelly, Esq.
 James Manning

Return to sender if no address is given. RETURN TO place on reverse.

1. The following service is requested (check one).

☐ Show to whom and date delivered..... 15¢

☐ Show to whom, date, & address of delivery.. 35¢

☐ RESTRICTED DELIVERY
Show to whom and date delivered..... 65¢

☒ RESTRICTED DELIVERY
Show to whom, date, and address of delivery 85¢

2. ARTICLE ADDRESSED TO:
REG. REGISTRY OF MOTOR VEHICLES

3. ARTICLE DESCRIPTION:
REGISTERED NO. *473622* CERTIFIED NO. INSURED NO.

(Always obtain signature of addressee or agent)

I have received the article described above.
SIGNATURE ☐ Addressee ☐ Authorized Agent
C. SCIARAFFA

4. DATE OF DELIVERY *JUN 28 1976* POSTMARK

5. ADDRESS (Complete only if requested)
1117 Beacon St Boston

6. UNABLE TO DELIVER BECAUSE: CLERK'S INITIALS

U.S. POSTAGE 566-047

Jan 31, Jan 1975

RETURN RECEIPT, REGISTERED, INSURED AND CERTIFIED MAIL

EXHIBIT D.

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, SS

Affidavit

I, Donald E. Montrym, on oath do depose and say that:

1. I reside at 417 Arlington Street, Acton, Middlesex County, with my two minor sons of whom I am the sole surviving parent and the sole source of support.

2. I was born April 10, 1930 at Schenectady, New York.

3. The motor vehicle operator's license issued to me by the Commonwealth of Massachusetts is numbered 052-22-3814.

4. I am employed as Purchasing Manager, Capital Equipment, Digital Equipment Corporation, Acton, Massachusetts.

5. Said employment requires me frequently to travel all over the United States using aircraft, trains, buses and automobiles, the latter being my own vehicle and vehicles leased from commercial agencies.

6. I use my own vehicle to commute to work, to shop for necessities for myself and my two sons, and to transport Boy Scouts and other young people on various excursions as the need arises.

7. The suspension of my license requires me to rely on other persons for transport, to forgo various duties of employment, and to forgo personal uses of transport, all to my harm.

DONALD E. MONTRYM

[Jurat omitted in printing.]

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS.

[Title omitted in printing.]

Order.

July 7, 1976

FREEDMAN, D.J.

In view of the decisions of the Supreme Court, *Bell v. Burson*, 402 U.S. 535 (1971), and of the lower federal courts, *Pollard v. Panora*, C.A. No. 75-2647-T (D. Mass. Mar. 25, 1976); *Cicchetti v. Lucey*, 377 F. Supp. 215 (D. Mass. 1974), *vacated on other grounds*, 514 F.2d 362 (1st Cir. 1975), it may be that the result in this case so clearly obtains as to obviate the requirement for a three-judge court. *Bailey v. Patterson*, 369 U.S. 31 (1962). The parties are invited to submit memoranda on this issue within 21 days of the date of this order.

FRANK H. FREEDMAN,
United States District Judge.

UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF MASSACHUSETTS.

[Title omitted in printing.]

Restraining Order.

This cause came on to be heard upon plaintiff's motion consented to by the defendant, and upon the verified complaint of plaintiff, Donald E. Montrym, and it appearing to the court that the defendant's action in continuing to suspend plaintiff's driver's license #052223814 will cause irreparable injury and loss of livelihood, therefore:

IT IS ORDERED, adjudged, and decreed that the defendant Panora, his agents, servants, employees, attorneys, and all persons in active concert and participation with him, are enjoined from revoking Donald E. Montrym's driver's license #052223814 on account of his alleged failure to take a breathalyzer test in accordance with G.L. Ch. 90 § 24(1)(f) on May 15, 1976; and it is further:

ORDERED, that this order shall remain in effect until such further order by the court.

Issued at 2:30 PM July 9, 1976.

FRANK H. FREEDMAN,
*United States District
Court Judge.*

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS.

[Title omitted in printing.]

Order.

November 17, 1976

FREEDMAN, D.J.

A three-judge court in the above-entitled case having been convened pursuant to 28 U.S.C. § 2284, it is ordered that a hearing on the merits be held before the United States District Court, on Wednesday, December 15, 1976, at 2:00 p.m., in Courtroom 3, 12th Floor, John W. McCormack Post Office & Courthouse Building, Boston, Massachusetts.

It is further ordered that: (1) the parties herein file a stipulation of undisputed facts and relevant documents on or before December 1, 1976; and (2) the parties herein submit their memoranda of law no later than December 8, 1976. Counsel are directed to file all papers in quadruplicate.

FRANK H. FREEDMAN,
United States District Judge.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS.

[Title omitted in printing.]

Answer.

The defendant in the above-entitled action hereby answers the various allegations of the complaint as follows:

1. The allegations contained in Paragraph 1 are statements of the nature of the action and therefore require no answer.

2A. The allegations contained in Paragraph 2A are admitted.

2B. The allegations contained in Paragraph 2B to the extent that they are a statement of the nature of the case require no answer and to the extent that they state that the requirement of Rule 23(a) and (b)(2) of the Federal Rules of Civil Procedure have been met are denied.

3. The allegations contained in Paragraph 3 are admitted.

4. The allegations contained in Paragraph 4 are statements of the nature of the case and therefore require no answer.

5. The allegations contained in Paragraph 5 are admitted.

6. The allegations contained in Paragraph 6 to the effect that the plaintiff was brought to the Acton police station and asked whether he wanted to submit to a breathalyzer test and that the plaintiff refused are admitted. The remaining allegations contained in Paragraph 6 are denied.

7. The defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 7.

8. The allegations contained in Paragraph 8 to the effect that the complaint charging the plaintiff with an offense

under G.L. c. 90, § 24(1)(a) was dismissed in the District Court of Central Middlesex are admitted. The defendant is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in Paragraph 8.

9. The defendant admits the allegations contained in the first sentence of Paragraph 9. The defendant denies the allegations contained in the last sentence of Paragraph 9 and by way of further answer states that the plaintiff's attorney requested an indefinite stay of any action by the Registrar on the plaintiff's license.

10. To the extent that the allegations contained in Paragraph 11 are conclusions of law, they require no answer. The allegations in Paragraph 10 to the effect that Exhibit B is a copy of the defendant's suspension notice are denied and by way of further answer states that Exhibit B is not a complete copy of the suspension notice sent by defendant. The remaining allegations contained in Paragraph 10 are admitted.

11. The allegations contained in Paragraphs 11 and 12 are admitted.

12. The allegations contained in the first two sentences of Paragraph 13 are admitted. By way of answer to the allegations contained in the last sentence of Paragraph 13 the defendant states that the plaintiff's license has been returned pursuant to an order entered by this court on July 9, 1976.

13. The defendant is without knowledge to form an opinion as to the truth of the allegations contained in Paragraph 14.

14. The allegations contained in Paragraph 15 are conclusions of law and therefore require no answer.

15. The allegations contained in Paragraph 16 are a statement of the nature of the action and therefore require no answer.

16. The allegations contained in Paragraphs 17 through 22 are conclusions of law which require no answer. If called upon to respond, the defendant would deny the same.

FIRST DEFENSE

On May 15, 1976, at approximately 8:45 p.m., an Acton Police Officer offered to the plaintiff a chemical test or analysis of his breath and at the same time informed the plaintiff that his license to operate a motor vehicle in the Commonwealth would be suspended for a period of ninety days for refusing to submit to said test.

SECOND DEFENSE

Massachusetts General Law Chapter 90, § 24(1)(f) is constitutional on its face and as applied to the plaintiff meets the constitutional requirement of due process.

By his Attorney,
STEVEN A. RUSCONI,
Assistant Attorney General.

Dated: December 6, 1976.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS.

[Title omitted in printing.]

Agreed Statement of Facts and Documents.

Reserving all rights to introduce additional evidence if necessary, and to object to the introduction of any of the within evidence on grounds of relevancy or materiality, the parties hereby agree that the following facts are true:

1. On May 15, 1976, at approximately 8:15 p.m., Donald E. Montrym, was driving his station wagon upon a public way in the town of Acton. At this time Donald Montrym's vehicle was involved in a collision with a motorcycle. Shortly thereafter, at approximately 8:30 p.m., an Acton police officer arrested Donald Montrym and charged him with violation of Mass. G.L. Ch. 90 § 24(1)(a), operating under the influence of intoxicating liquor, driving to endanger, and no registration in possession. The police officer issued a citation, pursuant to G.L. Ch. 90C § 1, a copy of which is attached as Exhibit A.

2. On June 2, 1976, a hearing was held in the District Court of Central Middlesex on the criminal complaint charging Donald Montrym with operating under the influence of intoxicating liquor, driving to endanger, and failing to have his registration in his possession. The driving under the influence charge was dismissed and a copy of the record of the district court on this complaint is attached hereto as Exhibit B. Mr. Montrym was found not guilty on the driving to endanger charge. On the "No registration" charge, Mr. Montrym was found guilty and fined \$15.

3. On May 25, 1976, the Registrar of Motor Vehicles of the Commonwealth of Massachusetts, Robert A. Panora, received from the Acton Police Department a Report of Refusal to Submit to a Chemical Test. A copy of the report is attached hereto and marked Exhibit C and is hereby incorporated by reference. The report was made on the form approved by the Registrar.

4. On June 2, 1976, Mr. Montrym's attorney wrote the Registrar of Motor Vehicles requesting a stay of any possible action that might be taken with respect to Mr. Montrym's license. A copy of this request is attached as Exhibit D, and was received by the Registrar on June 3, 1976.

5. On June 7, 1976, the Registrar suspended Donald Montrym's driver's license on the basis of the report referred to above in paragraph 3 and pursuant to G.L. Ch. 90 § 24(1)(f). A copy of the Registrar's notice of suspension is attached hereto and marked Exhibit E.

6. On June 7, 1976, Mr. Montrym's attorney wrote the Board of Appeals for a hearing pursuant to G.L. Ch. 90 § 28, a copy of his letter being attached as Exhibit F. This letter was received by the Board of Appeals on June 8, 1976.

7. Mr. Montrym surrendered his driver's license to the Registrar on June 8, 1976.

8. On June 8, 1976, the Board of Appeals mailed a set of forms to Mr. Montrym's attorney and requested that these be completed in duplicate. A copy of the Board of Appeals' request is attached as Exhibit G. This request was received on June 10, 1976 by Mr. Montrym's attorney, completed, mailed back to the Board of Appeals on June 10, 1976, and received by the Board of Appeals on June 11, 1976.

9. On June 11, 1976, the Registrar replied to Mr. Montrym's attorney's letter of June 2, 1976 referred to above in paragraph 4, a copy of said reply being attached as Exhibit H.

10. On June 24, 1976, the Board of Appeals notified Mr. Montrym that he could have a hearing on July 6, 1976, a copy of said notice being attached as Exhibit I.

11. On June 28, 1976, Mr. Montrym, by his attorney, made demand for the return of his driver's license upon the Registrar, a copy of said demand being attached as Exhibit J. The Registrar refused this demand, but Mr. Montrym's license was returned on July 15, 1976, pursuant to an order issued by this court at 2:30 p.m. July 9, 1976.

12. After delivering his license to the Registrar pursuant to a suspension notice for ninety days in the form of Exhibit E, a licensee may obtain an immediate hearing pursuant to G.L. Ch. 90 § 24(1)(g). At such a hearing, the licensee may be represented by an attorney. The procedure at the hearing is as follows: the hearing officer examines the Report of Refusal to Submit to Chemical Test to determine that it is complete and complies with the requirements of Ch. 90 § 24(1)(f). If the Report is not complete or does not comply, the hearing officer returns the driver's license in hand to the licensee. If the Report is complete and complies, the burden is on the licensee to show that one of the factual issues set forth in Ch. 90 § 24(1)(g) was in the negative, i.e., there was no probable cause, no arrest, or no refusal to submit. The hearing officer will adjourn the hearing at his own request, or upon the request of the licensee, to permit the police officers or other witnesses to be brought in for questioning, or for counter affidavits to be submitted, or to allow the hearing officer to interview witnesses in the field.

Witnesses at a hearing may be questioned by the hearing officer, or a licensee, or his attorney. From an adverse decision of the Registrar, a licensee may take an appeal to the Board of Appeals pursuant to G. L. Ch. 90 § 28.

13. In 1975, 884 persons were fatally injured in automobile accidents. Of these 884 fatalities, 283 resulted from accidents in which alcohol was determined as the attributing cause.

STEVEN A. RUSCONI,
Assistant Attorney General.

ROBERT W. HAGOPIAN.

COMMONWEALTH OF MASSACHUSETTS Acton POLICE DEPT.
93502R

VIOLATION NOTICE

OPERATOR Donald E. Montrym
ADDRESS 417 Arlington St., Acton
LIC. NO. 052223814 STATE MA CLASS 2
OWNER Same
ADDRESS Same
REG. NO. 31702W STATE MA ISS.
DATE OF OFFENSE 5-15-76 PLACE Arlington St. TIME 8:30 p.m.
VIOLATOR: OPERATOR ☒ OWNER ☐ VIOLATION(S): 1. Operating under the influence of alcohol; 2. Operating to endanger; 3. No Reg. in possession.
Headed north on Arlington St. resulting in MV accident.

SPEED POSTED _____ MPH ESTIMATED ☐ Clocked ☐ RADAR ☐
ROAD DIVIDED: YES ☐ NO ☒ NO. OF LANES ☒
DISTRICT: TH. SETT. ☒ RURAL ☐ SURFACE: DRY ☒ WET ☐ ICE ☐ SNOW ☐
TRAFFIC: HEAVY ☐ MEDIUM ☐ LIGHT ☒ DATE CITATION WRITTEN 5-15-76
WARNING ☐ ARREST ☒ COMPLAINT ☐ COURT LOCATION Concord
POLICE OFFICER Calvin H. O'Coin

COMMONWEALTH OF MASSACHUSETTS.
DISTRICT COURT OF CENTRAL MIDDLESEX.

COMMONWEALTH
vs.
DONALD E. MONTRYM

VIOLATION OF MOTOR VEHICLE LAW

OPERATING MV.V UNDER INF. INTOX. LIQ General Laws, Chapter 90, Section 24.

Penalty: Fine not less than \$35. nor more than \$1,000., or imprisonment not less than 2 weeks nor more than 2 yrs., or both such fine & imprisonment.

ARREST 5-17-76 [sic]

DEFT. NOTIFIED OF RIGHT TO HAVE COUNSEL
_____ J.

Atty. Bates filed app — plea NG C. 6-2-76

FORTE, J.

5-28-76 Motion to Suppress & affidavit filed.

Dismissed. Breathalyzer refused when requested within ½ hr of arrest at station. See affidavit & memorandum.

GELINAS, J.

*To the District Court of Central Middlesex,
in the County of Middlesex.*

George W. Robinson of Acton in said County, in behalf of the Commonwealth of Massachusetts, on oath, complains that Donald E. Montrym of Acton on 5-15-76 at Acton aforesaid upon a way or in a place to which the public has a right of access, or upon a way or in a place to which members of the public have access as invitees or licenses, did operate a motor vehicle while under the influence of intoxicating liquor against the peace of said Commonwealth and contrary to the form of the Statute in such case made and provided.

GEORGE W. ROBINSON,
Complainant.

Received and sworn to 5-17-76 before said Court.

EDWARD F. SULESKY,
Clerk of said Court.

*At the District Court of Central Middlesex, holden at
Concord, within the County of Middlesex, for the trans-
action of Criminal Business.*

GEORGE W. ROBINSON of Acton in the County of Middlesex, complainant, and DONALD E. MONTRYM of Acton in the County of Middlesex, defendant.

Complaint for operating a motor vehicle under the influence, G.L. CH 90:24.

I hereby certify that the above entitled complaint was duly entered in said Court on the 17th day of May A.D. 1976.

That on the 17th day of May A.D. 1976, the said defendant is arraigned in said Court upon said complaint, and he is asked by the Court whether he is guilty or not guilty of the allegations contained in said complaint, and the said defendant pleads and says that he is not guilty, and the hearing thereon is then and there continued from time to time to the second day of June A.D. 1976 on which day trial is had and the Court thereupon dismissed the complaint.

IN TESTIMONY that the foregoing is a true copy of record in the case of the Commonwealth vs. DONALD E. MONTRYM from the records of said Court, together with an attested copy of the complaint, I hereunto subscribe my name and affix the seal of said Court, at Concord aforesaid, this 25th day of June A.D. 1976.

Attest: _____
Clerk of said Court.

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, SS.

DISTRICT COURT OF
CENTRAL MIDDLESEX
CRIMINAL #4703-5

COMMONWEALTH OF MASSACHUSETTS

v.

DONALD E. MONTRYM

Motion to Suppress Evidence.

Now comes the defendant, being aggrieved by an unlawful arrest and by deprivation of his rights to submit to a breathalyser test, promptly to be informed of his right to a bail hearing respectfully moves this Honorable Court to suppress:

1. Any evidence as to the physical condition or actions of the plaintiff on or about the evening of May 15, 1976.
2. Any evidence as to his possession or lack of certificate of registration at said time.
3. Any evidence of admissions by way of act or statement of the defendant obtained directly or indirectly from his arrest or from deprivation of his rights while in custody.

The defendant states as grounds for this motion:

1. There was no probable cause for the police to believe at the time of his arrest that the defendant had no certificate of registration on his person or in his vehicle.
2. There was no probable cause for the police to believe at the time of arrest that the defendant had been operating under the influence of intoxicating liquor.

3. There was no probable cause for the police to believe at the time of arrest that the defendant was in the process of operating his motor vehicle so as to endanger the public.

4. There was no existing breach of the peace culpably attributable to the defendant at the time of his arrest.

5. The defendant was denied the opportunity to exculpate himself by means of breathalyser test.

6. The defendant was denied the opportunity to prepare his defense by means of his not being informed of his right to bail hearing.

By his attorney,

RICHARD BATES HARRIS.

NOTICE OF MOTION

AND

CERTIFICATE OF NOTICE OF MOTION

To: Clerk For Criminal Business
District Court of Central Middlesex
Concord, MA 01742

To: Sergeant George W. Robinson
Acton Police Department
Acton, MA 01720

Please place the above action on list for June 2, 1976 at 9:00 a.m. for hearing of the above motion.

I certify that the above motion has been filed and notice given as required by rule of court.

RICHARD BATES HARRIS,
Attorney for moving party.

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, SS.

DISTRICT COURT OF
CENTRAL MIDDLESEX
CRIMINAL #4703-5

COMMONWEALTH OF MASSACHUSETTS

v.

DONALD E. MONTRYM

Affidavit in Support of Motion to Suppress.

The undersigned being duly sworn, deposes and says to the best of his knowledge and belief:

1. Saturday evening, May 15, 1976, after stopping his motor vehicle at the intersection of Arlington Street with Summer Street, Acton, looked both ways, saw nothing, and then proceeded across Summer Street toward Acton.

2. When he was nearly through the intersection, his vehicle was struck in the right rear wheel well behind the right rear wheel by a motorcycle. Both vehicles were disabled.

3. The Acton police arrived to find the undersigned outside his vehicle and his son Joey inside it. After vainly requesting the undersigned to produce his registration (the same being in his home a block away), the police ordered the undersigned to spread his body over the side of his vehicle. He was frisked and manacled with his hands behind his back. This was the first time the undersigned has ever been arrested or searched or apprehended by any police.

4. The undersigned was not allowed to make any arrangements for the care of his son Joey, of whom he is the sole surviving parent.

5. Upon being transported to the Acton police station, the undersigned kept fretting about the welfare of his son. Upon being told he had the right to use the telephone, the undersigned attempted without success to telephone an attorney.

6. The undersigned was asked whether he wanted to submit to a breathalyser test and refused, not knowing that refusal would cost him his license but acceptance, regardless of the results thereof, would not cost his license under certain conditions. He was not informed of the cost to him financially of said breathalyser test or of any alcoholic prevention program.

7. The undersigned does not recall being informed of any right to bail.

8. The undersigned was then visited in the Acton police jail at about 9:05 p.m. by attorney Richard Bates Harris. Although he has long known attorney Harris, he did not summon him and was surprised and glad to see him.

9. After requesting attorney Harris' advice, the undersigned requested a breathalyser test and a bail hearing.

10. The Acton police refused to give the undersigned a breathalyser test despite repeated requests by the undersigned and said Harris from 9:07 till 10:07 p.m. The police said that there was a functioning breathalyser machine and a competent operator at hand.

11. At 9:45 p.m. a bail hearing was held and the defendant undersigned was released on personal cognizance till May 17, 1976.

12. The undersigned believes that a breathalyser test would have confirmed his belief that he was not intoxicated with an alcoholic beverage nor under the influence of intoxicating liquor that evening.

DONALD E. MONTRYM

[Jurat omitted in printing.]

EXHIBIT D.

June 2, 1976

Registry of Motor Vehicles
100 Cambridge Street
Boston, MA 02114

RE Donald E. Montrym
417 Arlington Street, Acton
License #052223814 Mass
Registration #71202W Mass
Acton Police Department Citation #93592R
Incident: May 15, 1976

Gentlemen:

On May 15, 1976, the above operator was reported to have refused to submit to the breathalyser. On June 2, 1976 at 10:00 a.m. at the District Court of Central Middlesex, the enclosed motion to suppress was heard. Justice Andre A. Gelinas then dismissed the complaint for operating under the influence on ground #5 listed in the motion and then denied the motion as to the two other complaints, operating to endanger and no registration certificate in possession.

On June 2, 1976 at 2:00 p.m. the same judge heard evidence on the remaining complaints and found the defendant not guilty of driving to endanger and guilty of the remaining charge with \$15 fine.

I enclose photocopies of the motion and supporting affidavit and request that any action to have Mr. Montrym's

license be stayed indefinitely so that no further hearing be necessary.

Please advise whether you may grant my request.

Very truly yours,

RICHARD BATES HARRIS,
Attorney for Donald E. Montrym.

ADDRESS AND COPY TO SUSPENSION SECTION AND GIVE FILE NUMBER YOUR CASE WILL NOT BE REVIEWED UNTIL YOUR LICENSE IS REVOKED OR REVOKED LICENSE IS RECEIVED AT THE REGISTRY OFFICE



THE COMMONWEALTH OF MASSACHUSETTS
REGISTRY OF MOTOR VEHICLES

100 NASHUA STREET BOSTON, MASS 02114

NOTICE OF ACTION
BY THE REGISTRAR

ADDRESSEE

MONTGOMERY, DONALD C
417 ARLINGTON ST
ACTON MA 01720

DATE OF BIRTH 04-10-30
DATE OF SUSPENSION OR REVOCATION 06-07-76

2

YOU ARE HEREBY NOTIFIED THAT IN ACCORDANCE WITH STATUTORY AUTHORITY I HAVE THIS DAY
SUSPENDED YOUR LICENSE TO OPERATE MOTOR VEHICLES.
FOR THE REASON SHOWN IN CODE BELOW
RETURN ONLY ITEM(S) NOTED ABOVE

THIS ACTION IS EFFECTIVE AS OF THE HOUR IT WAS
ISSUED AND YOU MUST COMPLY WITH IT IMMEDIATELY
FOR THE REASON SHOWN IN CODE BELOW

REASON (CODED) OVER	LIC. PERMIT OR REG. NUMBER	PERIOD OF TIME	FILE NUMBER	LOCATION AND DATE OF OFFENSE	MO	DAY	YR
2J	052223814	90 DAYS	CL07017	ACTON	05	15	76

IMPORTANT

When your LICENSE to operate motor vehicles has been suspended or revoked you MUST CEASE OPERATING and DELIVER TO ME AT ONCE said license and/or permit. You must not again operate a motor vehicle until your license has been reinstated.

When your RIGHT TO OPERATE has been suspended you MUST NOT OPERATE and you cannot apply for a learner's permit or a license until your right to operate has been reinstated. If you already hold a Massachusetts license and/or permit, you MUST SURRENDER IT AT ONCE. If you are a non-resident you cannot operate on your out-of-state license until your right to operate has been reinstated.

A suspended license and/or permit may be either mailed in the enclosed envelope or surrendered at any Registry Office. Bring this notice.

When the REGISTRATION OF YOUR MOTOR VEHICLE or the right to have it operated has been suspended or revoked, operation of such vehicle must cease at once, and if the vehicle is registered in Massachusetts, the registration certificate and number plates must be DELIVERED TO ME IMMEDIATELY.

CH 90 2B RIGHT OF APPEAL ANY PERSON AGGRIEVED BY A RULING OR DECISION OF THE REGISTRAR MAY WITHIN TEN DAYS THEREAFTER APPEAL FROM SUCH RULING OR DECISION TO THE BOARD OF APPEAL ON MOTOR VEHICLE LIABILITY POLICIES AND BONDS

Form R 50 100M REV. 6-74 092030

EXPLANATION OF CODES • INDICATES ACTION/MANDATORY

- 1A You were convicted of operating a motor vehicle while under the influence of intoxicating liquor.
- 1B You were convicted of not stopping and making known your name, residence and register number of the motor vehicle you were operating after knowingly colliding with or otherwise causing injury to a person.
- 1C You were convicted of going away without stopping and making known your name, residence, and the register number of the motor vehicle you were operating after knowingly colliding with or otherwise causing injury to property.
- 1D You were convicted of operating a motor vehicle negligently so that the lives or safety of the public might be endangered.
- 1E You were convicted of operating a motor vehicle recklessly.
- 1F You were convicted of operating a motor vehicle upon a bet or wager.
- 1G You were convicted of operating a motor vehicle in a race.
- 1H You were convicted of using a motor vehicle without authority.
- 1H-1 You were convicted of operating a motor vehicle without authority after suspension or revocation of your license.
- 1J You were convicted of leaving your operator's license or learner's permit to be used by another person.
- 1K You were convicted of falsely impersonating a person named in an application for an operator's license.
- 1L You were convicted of making a false statement in an application for an operator's license or learner's permit.
- 1M You were convicted of making a false statement in an application for registration of a motor vehicle or trailer.
- 1N You were convicted of procuring false impersonation in an application for a license to operate a motor vehicle or a learner's permit.
- 1P You were convicted three times of speeding and/or other offenses of chapter 90, sections 16, 17, 18, within a calendar year.
- 1Q After an investigation of a fatal accident in which a motor vehicle operated by you was involved and a hearing, I am unable to determine that the accident occurred without serious fault on your part.
- 1R You were convicted of stealing a motor vehicle or trailer or any illegal acts in connection with Ch. 26B, Sec. 28.
- 1T You were convicted of operating under the influence of a narcotic or other drug or vapor noted in chapter 90, section 24.

- 1X You were convicted of violation of Section 24B of Chapter 90.
- 2A Pending an investigation, it appears that a motor vehicle operated by you was involved in an accident that resulted in a death.
- 2B You failed to satisfy a properly damage judgment.
- 2D You defaulted a court summons.
- 2E Failure to pay a motor vehicle Excise tax.
- 2G You were issued three warning citations in one year.
- 2L-1 You refused to submit to a chemical test.
- 2L-2 You have been designated an habitual traffic offender.
- 2K You tendered a bad check.
- 2P You committed a violation of the motor vehicle laws of a nature which gives me reason to believe that your continued operation would be so seriously improper as to constitute an immediate threat to the public safety.
- 3B You are entitled to a hearing within 30 days.
- 3C I have reason to believe that you are an incompetent person to operate motor vehicles (lack of ability, legal qualification or fitness to operate or register a motor vehicle).
- 3C I have reason to believe that you did improperly operate a motor vehicle.
- 3D You, a minor, were convicted or adjudged delinquent of transporting an alcoholic beverage.
- 3D-1 You, a minor, were transporting an alcoholic beverage.
- 3D-2 You were adjudged a delinquent child (chapter 119, section 28B).
- 3E Result of a hearing on a violation of the motor vehicle or related laws.
- 3G You failed to file a report of an accident as required by law.
- 3H I have determined that your motor vehicle or trailer is improperly equipped or otherwise unfit to be operated.
- 3J You did allow your motor vehicle to be operated in violation of the laws and regulations pertaining to motor vehicles.
- 3K You were convicted of disposing of garbage in violation of statute.
- 3L You were convicted of abandoning a motor vehicle.
- 3M You were convicted of a fraudulent claim.
- 3N You were convicted of not displaying flares.
- 3P You failed to notify the registrar of a change of name, or address, or mail address within 30 days.
- 4D You have failed to file security in accordance with the provisions of general laws, chapter 90, section 30.

EXHIBIT F.

June 7, 1976

Board of Appeal on
Motor Vehicle Liability Policies
& Bonds
100 Cambridge Street
Boston, MA 02202

RE Donald E. Montrym
License 052223814
File DL07017
Acton 05-15-76
Suspension 06-07-76 : 2J

Gentlemen:

The above operator herewith requests a hearing on the decision that his license be suspended, on the ground that the District Court of Central Middlesex (Docket #4703) on June 2, 1976 found that he did not refuse to submit to a breathalyser test within the meaning of G.L. 90 s. 24 (1) (f) and hence the complaint was dismissed forthwith.

Very truly yours,

RICHARD BATES HARRIS.

EXHIBIT G.

Dear Sir:

Please complete form in duplicate & return to this office.

Thank you,

MARY EARNES,
Board of Appeal.

EXHIBIT H.

June 11, 1976

Richard B. Harris
Counselor At Law
11 Park Street
Leominster, Mass 01453

RE: Donald E. Montrym
D.O.B. 4/10/30

Dear Sir:

In reference to your letter of June 2, 1976 concerning the above-named, this is to advise you that his license has already been suspended and said license must be returned to this office immediately.

Very truly yours,

ROBERT A. PANORA,
Registrar

DO'N
DL7017

CC: Donald E. Montrym

EXHIBIT I.

The Commonwealth of Massachusetts

BOARD OF APPEAL ON MOTOR VEHICLE
LIABILITY POLICIES AND BONDS

June 24, 1976

Donald E. Montrym
417 Arlington Street
Acton, Mass.

cc: Richard Bates Harris
11 Park Street
Leominster, Mass.

Your appeal from the decision of the Registrar of Motor Vehicles has been received, and you are notified that, acting under the provisions of Section 28, Chapter 90 of the General Laws, as amended, the Board of Appeal on Motor Vehicle Liability Policies and Bonds will give a hearing on the matter in *Room 1806, Leverett Saltonstall Building, 100 Cambridge Street, Boston, Massachusetts, 02202.* on Tuesday, July 6, 1976 at 10:00 A.M.

Please arrange to have present at this hearing such witnesses as you may wish to have testify as to the facts in the case.

If you are under the jurisdiction of either the Probation Department or the Parole Board, written notice must be sent to that agency advising them of your appearance before this Board. A copy of the notice to that agency must be presented by you at the hearing.

Very truly yours,

RALPH A. IANNACO,
Secretary,
Board of Appeal

EXHIBIT J.

June 25, 1976

Mr. Robert A. Panora
 Registrar of Motor Vehicles
 100 Nashua Street
 Boston, Massachusetts

Dear Sir:

Please be advised that I represent Mr. Donald Montrym, 417 Arlington Street, Acton, Massachusetts; date of birth April 10, 1930; Massachusetts license no. 052223814. On June 7, 1976, you suspended Mr. Montrym's license for ninety days for refusal to submit to a breathalyzer test out of an incident occurring on May 15, 1976 and in accordance with G.L. Ch. 90 §24(1)(f). See your file no. DL 07017.

Please be advised that Mr. Montrym did not refuse to submit to a breathalyzer test on May 15, 1976 and that he was acquitted of driving under the influence of intoxicating liquors, G.L. Ch. 90 §(1)(a), on June 2, 1976, complaint no. 4703 in the District Court of Central Middlesex. In addition, the district court made a specific finding on the face of complaint that the police refused to give Mr. Montrym a breathalyzer test after he requested one. This finding is binding upon you. See *Ashe v. Swenson*, 397 U.S. 436 (1970).

Mr. Montrym depends upon his driver's license for his livelihood. Notwithstanding G.L. Ch. 90 §24(1)(g), your action in suspending his license without affording him a prior hearing is a patent deprivation of his liberty and property without due process and is in contravention of the Fourteenth Amendment of the United States Constitution.

See *Cicchetti v. Lucey*, 337 F. Supp. 215 (1974); and *Pollard v. Panora*, ____ F. Supp. ____ (D. Mass. 1976).

Demand is hereby made upon you to immediately reinstate Mr. Montrym's driver license. If you do not take this action and notify me accordingly by 9:30 a.m., Wednesday, June 30, 1976, I will appear in the federal district court for the district of Massachusetts and request that a restraining order be issued against you from continuing to suspend Mr. Montrym's license. I am also going to request the court to award actual and punitive damages.

Very truly yours,

ROBERT W. HAGOPIAN

RWH:hfc

cc.: Richard Harris, Esq., Co-Counsel
 Robert Kelly, Esq.
 James Manning

6m 3all Jan 1975

RETURN RECEIPT, REGISTERED, INSURED AND CERTIFIED MAIL

Put name or address in the "RETURN TO" space on reverse.

1. The following service is requested (check one).

☐ Show to whom and date delivered..... 15¢

☐ Show to whom, date, & address of delivery.. 35¢

☐ RESTRICTED DELIVERY.
Show to whom and date delivered..... 65¢

☒ RESTRICTED DELIVERY.
Show to whom, date, and address of delivery 85¢

2. ARTICLE ADDRESSED TO:
REGISTRY OF MOTOR VEHICLES

3. ARTICLE DESCRIPTION:
REGISTERED NO. *47362H* CERTIFIED NO. INSURED NO.

(Always obtain signature of addressee or agent)

I have received the article described above.
SIGNATURE ☐ Addressee ☐ Authorized Agent
C. SCIARAFFA

4. DATE OF DELIVERY *JUN 28 1976* POSTMARK

5. ADDRESS (Complete only if requested)
110 North St Boston

6. UNABLE TO DELIVER BECAUSE: CLERK'S INITIALS

U.S. POST OFFICE JUN 28 1976

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS.

[Title omitted in printing.]

Motion for Partial Summary Judgment
Pursuant to FRCP 56.

Now comes the plaintiff upon his complaint, the defendant's answer, the agreed statement of facts with exhibits, and the attached affidavits, and moves this Court to issue a judgment declaring G.L. Ch. 90 §24(1)(f) unconstitutional on its face and/or applied.

By his attorney,

ROBERT W. HAGOPIAN

[The original Decision and Opinion of the three-judge District Court, reported at 429 F. Supp. 1157 (D. Mass., March 25, 1977) are incorporated in the appellant's Jurisdictional Statement.]

**UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS.**

DONALD E. MONTRYM,
INDIVIDUALLY AND IN BEHALF OF
ALL OTHERS SIMILARLY SITUATED,

v.

ROBERT A. PANORA, REGISTRAR
OF MOTOR VEHICLES, AND HIS
SUCCESSORS IN OFFICE.

CIVIL ACTION
No. 76-2560-F

Before Campbell, Circuit Judge, Tauro and Freedman,
District Judges.

JUDGMENT.

April 4, 1977.

FREEDMAN, D.J.

This matter came on for hearing on plaintiff's motion for summary judgment on the issue of the constitutionality of M.G.L. c. 90 § 24(1)(f). The case having been duly argued by counsel and a decision having been rendered in an opinion filed March 25, 1977, it is hereby ORDERED, ADJUDGED and DECREED that the plaintiff's motion be granted.

United States Circuit Judge

FRANK H. FREEDMAN,
United States District Judge

JOSEPH L. TAURO,
United States District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS.

[Title omitted in printing.]

Defendant's Motion for Entry of Judgment.

The defendant moves this court to enter judgment on plaintiff's motion for partial summary judgment in accordance with Rule 58 of the Federal Rules of Civil Procedure. If the court requests, attorney for defendant will submit a proposed form of judgment.

By his Attorney,

STEVEN A. RUSCONI,
Assistant Attorney General.

Dated: April 7, 1977.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS.

v.

CIVIL ACTION
No. 76-2560-F

ROBERT A. PANORA, REGISTRAR
OF MOTOR VEHICLES, AND HIS
SUCCESSORS IN OFFICE.

Before Campbell, Circuit Judge, Tauro and Freedman,
District Judges.

Clarification of April 4, 1977 Judgment.

April 12, 1977.

FREEDMAN, D.J.

Defendant has apparently sought a clarification of the Judgment of April 4, 1977. For the reasons set forth in the Opinion filed March 25, 1977, that Judgment declares M.G.L. c.90 § 24(1)(f) unconstitutional on its face as it denies licensees due process and the defendant is thereby enjoined from enforcing this statutory provision.

FRANK H. FREEDMAN,
United States District Judge

JOSEPH L. TAURO,
United States District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS.

[Title omitted in printing.]

Notice of Appeal.

Notice is hereby given that Robert A. Panora, defendant in the above entitled action, hereby appeals to the United States Supreme Court from the final judgment granting plaintiff's motion for partial summary judgment on the issue of the constitutionality of Mass. Gen. Laws C. 90, § 24(1)(f). Said judgment was entered on April 4, 1977 in the United States District Court for the District of Massachusetts. Appeal is taken to the United States Supreme Court pursuant to 28 U.S.C. § 1253.

By his Attorney,

STEVEN A. RUSCONI,
Assistant Attorney General.

Dated: April 11, 1977.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS.

[Title omitted in printing.]

Motion for Contempt Order.

Plaintiff shows to the court as follows:

- 1) On March 25, 1977, this court enjoined the defendant Registrar of Motor Vehicles from enforcing M.G.L. Ch. 90 §24(1)(f) as against the certified class of plaintiffs;
- 2) The defendant Registrar has received a copy of this court's opinion of March 25, 1977 enjoining him from enforcing M.G.L. Ch. 90 §24(1)(f);
- 3) The plaintiffs have made a further demand for the return of their licenses, a copy of which is attached, and the defendant Registrar has refused this demand;
- 4) The defendant has nevertheless wholly failed to comply with the order of this court in that he has publicly refused to return the plaintiff's licenses which he previously revoked pursuant to M.G.L. Ch. 90 §24(1)(f) and which he presently has in his possession;
- 5) The refusal of the defendant to obey the order of this court on March 25, 1977 is calculated to cause the plaintiffs irreparable harm caused by the continued loss of their driver's licenses.

WHEREFORE, the plaintiffs demand that the defendant Registrar be held in contempt of court, for his neglect and refusal to comply with and obey the order of this court on March 25, 1977 enjoining him from enforcing M.G.L. Ch. 90 §24(1)(f); and that he be required to show cause

before this court why he should not be so held in contempt of court.

By his attorney,

ROBERT W. HAGOPIAN

April 7, 1977

Mr. Robert A. Panora
Registrar of Motor Vehicles
100 Nashua Street
Boston, Massachusetts 02110

Dear Sir:

I have been advised by your attorneys that as of this date you have failed to return the driver's license to certain motorists within the class certified in the class action, *Montrym v. Panora*, CA 76-2560F. Your action in withholding these licenses is contrary to the opinion of the federal district court which declared Ch. 90 §24(1)(f) unconstitutional and which enjoined you from enforcing M.G.L. Ch. 90 §24(1)(f). Further, the certified class includes all those persons "whose Massachusetts license to operate a motor vehicle has been suspended" pursuant to Ch. 90 §24(1)(f). On behalf of the class, demand is hereby made upon you to cease and desist from withholding these licenses and to immediately return the licenses forthwith. Unless I have your telephone assurance by 10:00 a.m., Tuesday, April 12, 1977 that these

licenses will be returned forthwith, I will request the federal district court to hold you in contempt.

Very truly yours,

ROBERT W. HAGOPIAN

RWH:hfc

cc: Robert Kelly, Esq.
Steven Rusconi, Esq.

75 JAN 30 1977
RETURN RECEIVED, REGISTERED, INSURED AND CERTIFIED MAIL

1. The following service is requested (check one).
☒ Show to whom and date delivered..... 15¢
☐ Show to whom, date, & address of delivery.. 35¢
☐ RESTRICTED DELIVERY.
 Show to whom and date delivered 65¢
☐ RESTRICTED DELIVERY.
 Show to whom, date, and address of delivery 85¢

2. ARTICLE ADDRESSED TO:
 Robert PANORA

3. ARTICLE DESCRIPTION:
 REGISTERED NO. 17087561 INSURED NO.
 (Always obtain the date of address or agent)

I have received the article described above.
 SIGNATURE C. E. COTTELL AUTHORIZED BY

4. DATE OF DELIVERY 1/27/77

5. ADDRESS (Complete only if restricted)

6. UNABLE TO DELIVER BECAUSE: CLAIMANT'S INITIALS

UNITED STATES DISTRICT COURT
 DISTRICT OF MASSACHUSETTS.

DONALD E. MONTRYM,
 INDIVIDUALLY AND IN BEHALF OF
 ALL OTHERS SIMILARLY SITUATED,
Plaintiff

v.

CIVIL ACTION
 No. 76-2560-F

ROBERT A. PANORA, REGISTRAR
 OF MOTOR VEHICLES, AND HIS
 SUCCESSORS IN OFFICE,
Defendants

Final Judgment.

This cause came on to be heard on plaintiff's motion for summary judgment and motion to certify the class; and the court having heard oral arguments and having considered the parties agreed statement of facts and documents; and it appearing that the M.G.L. Ch. 90 § 24(1)(f) is unconstitutional on its face in accordance with the opinion of this court filed on March 25, 1977 which is incorporated herein, and more specifically in that it violates the due process clause of the Fourteenth Amendment because it fails to provide a licensee an opportunity to respond prior to having his license revoked under the statute; and further that the defendant's continuing enforcement of M.G.L. Ch. 90 §24(1)(f) is and will cause irreparable injury to the plaintiffs by the loss of their driver's licenses and in accordance with said opinion; therefore:

IT IS HEREBY ORDERED, ADJUDGED, DECREED:
that

1. The class in this section is certified as follows:

All of those persons whose Massachusetts license to operate a motor vehicle has been, or is about to be suspended by the Registrar of Motor Vehicles or his predecessors or successors in office pursuant to Mass. General Laws Ch. 90 §24(1)(f);

2. Since M.G.L. Ch. 90 §24(1)(f) fails to provide a licensee with an opportunity to respond prior to suspension of his license in violation of the due process clause, it is declared unconstitutional on its face, and Robert A. Panora, Registrar of Motor Vehicles, his successors in office, his officers, agents, representatives, employees, attorneys, and all persons in active concert and participation with them, be and they hereby are permanently enjoined and restrained from revoking the driver's licenses of plaintiffs pursuant to M.G.L. Ch. 90 §24(1)(f); and further the Registrar, his successors in office, his officers, agents, representative, employees, attorneys, and all persons in active concert and participation with them are ordered and directed to return by May 11, 1977 the driver's licenses of the plaintiffs which are now in their possession and which were previously revoked pursuant to M.G.L. Ch. 90 §24(1)(f).

FRANK H. FREEDMAN,
United States Judge
JOSEPH L. TAURO,
United States Judge

Issued at Boston on May 4, 1977

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS.

[Title omitted in printing.]

Notice of Appeal.

Notice is hereby given that Registrar of Motor Vehicles for the Commonwealth of Massachusetts, the defendant in the above entitled action, hereby appeals to the United States Supreme Court from the final judgment granting plaintiff's motion for summary judgment on the issue of the constitutionality of Mass. Gen. Laws c. 90, § 24(1)(f). Said judgment was entered on May 4, 1977, in the United States District Court for the District of Massachusetts. Appeal is taken to the United States Supreme Court pursuant to 28 U.S.C. § 1253.

By his Attorney,

STEVEN A. RUSCONI,
Assistant Attorney General.

Docketed May 13, 1977, 3:23 P.M.

**UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS.**

[Title omitted in printing.]

**Motion for Stay of Judgment and Order
Pursuant to Supreme Court Rule 18.**

The Registrar of Motor Vehicles of the Commonwealth of Massachusetts, defendant in the above entitled action respectfully moves this Court for a stay of its judgment of May 4, 1977 declaring Mass. Gen. Laws c. 90, §24(1)(f) unconstitutional and enjoining the defendant from suspending licenses thereunder. The defendant has filed a Notice of Appeal to the Supreme Court of the United States and request that the Judgment of this Court be stayed pending a final disposition of the appeal by the Supreme Court. This motion is filed pursuant to Supreme Court Rule 18 and the grounds for the motion are as follows:

1. In its opinion, and judgment this Court held the Massachusetts Implied Consent Statute, Mass. Gen. Laws, c. 90, §24(1)(f), violates the Due Process clause of the Fourteenth Amendment by failing to provide for an opportunity to respond to the suspension of a motor vehicle operator's license for failure to submit to a chemical test or analysis of his breath. The ability of a state to enact such a statute poses a legal issue of fundamental importance demanding a resolution by the Supreme Court.

2. In its opinion this Court noted that the results of the chemical test are of great value in the prosecution of drunk driving cases. (Opinion 13).

3. The public interest in having a statute which requires a motor vehicle operator to submit to a chemical test or analysis as set forth in Mass. Gen. Laws, c. 90, §24(1)(f)

will be irreparably harmed if the judgment of this Court enjoining the defendant from enforcing the statute pending disposition of defendant's appeal. If the judgment of the Court is not stayed pending disposition of the appeal the availability of the result of a chemical test will be greatly if not completely diminished, and there will thereby be a less of a likelihood that those guilty of operating a motor vehicle under the influence of intoxicating liquor and cause damage while doing so will be convicted and punished. A subsequent reversal by the Supreme Court of the United States would not compensate for the harm suffered by the public due to the inability to obtain the results of a chemical test under the statute.

For these reasons and those contained in the accompanying affidavit and memorandum of law, the defendant respectfully requests a stay in this Court's Judgment pending final disposition of his appeal.

By his Attorney,

STEVEN A. RUSCONI,
Assistant Attorney General.

Dated: May 13, 1977

5-24-77. After consultation with Tauro, J., the motion for stay is denied.

FREEDMAN, J.

AFFIDAVIT OF E. THEODORE GUNARIS,
ACTING REGISTRAR OF MOTOR VEHICLES.

I, E. Theodore Gunaris, depose and state the following:

1. Since April 15, 1977, as a result of a vacancy in the Office of Registrar of Motor Vehicles, I have been, under provisions of Chapter 16, Section 9 of the Massachusetts General Laws, exercising and performing the powers and duties of Registrar of Motor Vehicles.

2. It is my understanding the original concept of a mandatory suspension of an operator's license for refusal to submit to a chemical test was a legislative effort to assist law enforcement officials in the prosecution of criminal cases involving the operation of motor vehicles by motorists who were under the influence of intoxicating liquor.

3. It is my belief the Massachusetts Legislature in enacting the Implied Consent statute afforded innocent motorists a method in which to protect themselves by formulating evidence scientifically to prove they were not operating a motor vehicle while under the influence of intoxicating liquor, as believed by an arresting officer.

4. It is my opinion the statutory license suspension mandated by the Legislature for one who refuses to accept an offer of a breathalyzer test has increased the awareness of the motoring public to the dangers of driving after drinking intoxicating liquor.

5. The punitive measure society purposely imposed for commission of an offense under discussion, has, in my opinion, to some extent, discouraged such driving behavior which has proven to be a primary factor in fatal and non-fatal accidents.

6. The Massachusetts Registry of Motor Vehicles statistical findings show an increase of 38.7% from 1972 to 1975 in fatal accidents which were alcohol related and it is my

judgment that this mandatory forfeiture of license assures the law abiding motorists that they are afforded a reasonable measure of protection while interacting with other drivers on the ways of the commonwealth. The foregoing findings are based upon the compilation of statistics of the Department which are attached hereto.

7. I am also of the opinion, based upon thirty-one years experience with the Registry of Motor Vehicles, the mandatory license suspension for refusal to submit to a chemical test has proven to be the most successful countermeasure available or used in deterring motorists from operating motor vehicles after they have consumed intoxicating alcohol. Most of my associates in the field of law enforcement and motor vehicle administrators share this opinion.

Signed under the pains and penalties of perjury this twelfth day of May 1977.

E. THEODORE GUNARIS,
Acting Registrar of Motor Vehicles.

COMMONWEALTH OF MASSACHUSETTS.

Registry of Motor Vehicles
Statistician's Office
Boston, Massachusetts

Fatal Accidents — Alcohol Related — Years 1972-1975.

	1972	1973	1974	1975	% Change 1972 — 1975
Drivers Involved (all ages)	1,194	1,207	1,141	1,075	- 10.0
Drivers Involved (ages 18-20)	176 (14.7%)	231 (19.1%)	239 (20.9%)	208 (19.3%)	+ 18.2
Drivers Reported Drinking (all ages)	182	231	282	255	+ 40.1
Drivers Reported Drinking (ages 18-20)	32 (17.6%)	71 (30.7%)	91 (32.3%)	70 (27.5%)	+ 118.8
Persons Fatally Injured (all ages)	991	1,010	961	884	- 10.8
Persons Fatally Injured (ages 15-24)	328 (33.1%)	388 (38.4%)	415 (43.2%)	363 (41.1%)	+ 10.7
Persons Fatally Injured in Alcohol Related Accidents	204 (20.6%)	254 (25.1%)	313 (32.6%)	283 (32.0%)	+ 38.7

COMMONWEALTH OF MASSACHUSETTS

Registry of Motor Vehicles
Statistician's Office
Boston, Massachusetts

YEAR: 1972

Drivers Involved in Fatal Accidents

Age of Drivers	Drivers Involved	% of Total	Drivers Drinking	% of Total
Under 16	2	0.2	1	0.5
16	20	1.7	0	0.0
17	59	4.9	8	4.4
18	61	5.1	12	6.6
19	60	5.0	8	4.4
20	55	4.6	12	6.6
21	65	5.4	17	9.3
22	47	3.9	12	6.6
23	56	4.7	15	8.3
24	46	3.9	8	4.4
25-29	153	12.8	22	12.1
30-34	107	9.0	24	13.2
35-39	100	8.4	12	6.6
40-44	69	5.8	12	6.6
45-49	76	6.4	11	6.1
50-54	57	4.8	4	2.2
55-59	46	3.8	2	1.1
60-64	44	3.7	1	0.5
65-69	24	2.0	0	0.0
70-74	17	1.4	1	0.5
75 years & over	27	2.3	0	0.0
not stated	3	0.2		
TOTALS	1,194	100.0	182	100.0

COMMONWEALTH OF MASSACHUSETTS

Registry of Motor Vehicles
 Statistician's Office
 Boston, Massachusetts

YEAR: 1973

Drivers Involved in Fatal Accidents

Age of Drivers	Drivers Involved	% of Total	Drivers Drinking	% of Total
Under 16	6	0.5	2	0.9
16	22	1.8	5	2.2
17	62	5.1	19	8.2
18	78	6.5	30	13.0
19	80	6.6	25	10.8
20	73	6.0	16	6.9
21	62	5.1	14	6.1
22	45	3.7	9	3.9
23	43	3.6	11	4.8
24	37	3.1	6	2.6
25-29	166	13.8	23	9.9
30-34	106	8.8	20	8.7
35-39	74	6.1	11	4.8
40-44	62	5.1	10	4.3
45-49	75	6.2	6	2.6
50-54	56	4.7	12	5.2
55-59	45	3.7	4	1.7
60-64	33	2.7	7	3.0
65-69	31	2.6	0	0.0
70-74	15	1.3	1	0.4
75 years & over	27	2.2	0	0.0
not stated	9	0.8		
TOTALS	1,207	100.0	231	100.0

COMMONWEALTH OF MASSACHUSETTS

Registry of Motor Vehicles
 Statistician's Office
 Boston, Massachusetts

YEAR: 1974

Drivers Involved in Fatal Accidents

Age of Drivers	Drivers Involved	% of Total	Drivers Drinking	% of Total
Under 16	3	0.3	1	0.3
16	23	2.0	3	3.1
17	61	5.3	11	3.9
18	87	7.6	44	15.6
19	83	7.3	24	8.5
20	69	6.0	23	8.2
21	58	5.1	19	6.7
22	64	5.6	18	6.4
23	44	3.9	6	2.1
24	40	3.5	11	3.9
25-29	151	13.3	43	15.2
30-34	98	8.6	28	9.9
35-39	65	5.7	14	5.0
40-44	48	4.2	9	3.2
45-49	55	4.8	12	4.3
50-54	48	4.2	3	1.1
55-59	42	3.7	6	2.1
60-64	34	3.0	4	1.4
65-69	31	2.7	3	1.1
70-74	14	1.2	0	0.0
75 years & over	17	1.5	0	0.0
not stated	6	0.5		
TOTALS	1,141	100.0	282	100.0

COMMONWEALTH OF MASSACHUSETTS

Registry of Motor Vehicles
Statistician's Office
Boston, Massachusetts

YEAR: 1975

Drivers Involved in Fatal Accidents

Age of Drivers	Drivers Involved	% of Total	Drivers Drinking	% of Total
Under 16	2	0.2	0	0.0
16	22	2.0	9	3.5
17	69	6.4	17	6.7
18	76	7.1	31	12.1
19	69	6.4	23	9.0
20	63	5.9	16	6.3
21	57	5.3	14	5.5
22	61	5.7	16	6.3
23	51	4.7	14	5.5
24	45	4.2	8	3.1
25-29	157	14.6	43	16.9
30-34	80	7.4	17	6.7
35-39	59	5.5	13	5.1
40-44	53	4.9	15	5.9
45-49	57	5.3	5	1.9
50-54	50	4.7	7	2.7
55-59	30	2.8	3	1.2
60-64	23	2.1	0	0.0
65-69	21	2.0	2	0.8
70-74	7	0.6	0	0.0
75 years & over	20	1.9	2	0.8
not stated	3	0.3		
TOTALS	1,075	100.0	255	100.0

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS.

[Title omitted in printing.]

Motion for Relief from Judgment.

The defendant in the above entitled action moves this court pursuant to Fed. R. Civ. P., Rule 60(b)(6) to modify the judgment entered on May 4, 1977. In support thereof, the defendant states the following:

1. In its opinion this Court held that the Massachusetts Implied Consent Statute, Mass. Gen. Laws, c. 90, § 24(1)(f) is unconstitutional because it fails to provide an opportunity to respond prior to the suspension of a motor vehicle operator's license for failure to submit to a test or chemical analysis of his breath as required under the statute.

2. In its opinion this Court noted that the results of a chemical test obtained under the statute are a valuable piece of evidence in the prosecution of a drunk driving case and that the state has an interest in encouraging motorists to take the test. (Opinion 13.)

3. The judgment entered by the Court enjoins the Registrar from enforcing the provisions of Mass. Gen. Laws, c. 90 § 24(1)(f). The effect of this judgment will be to greatly if not completely diminish the availability of results of chemical tests for use in the prosecution of drunk driving cases because a suspension for refusal to submit to a chemical test may not now be imposed.

4. Pending the appeal of this case, the interest of the Commonwealth in obtaining the results of a chemical test for use in the prosecution of drunk driving cases as well as the interest of an individual member of the class defined in the judgment of the Court in obtaining a hearing prior to

the suspension of his driver's license for failure to submit to a chemical test under the statute would be served by modifying the judgment to enjoin the defendant from suspending a license under the statute only in those cases where the motorist requests a hearing with the Board of Appeal on Liability Policies and Bonds. Such an order would allow the Commonwealth to maintain an effective breathalyzer statute and at the same time would allow those members of the class who disputed the contents of the report to respond prior to the actual suspension of their right to operate a motor vehicle.

This motion is filed with a Motion For Stay of Judgment pursuant to Supreme Court Rule 18 but is not filed in the alternative. Also, by filing this motion, the defendant does not intend to waive any arguments on appeal as to the appropriateness of the Judgment entered by this Court on May 4, 1977. Were the stay to be granted the problems necessitating this motion would be resolved.

By his Attorney,

STEVEN A. RUSCONI,
Assistant Attorney General.

Dated: May 13, 1977

5-24-77. After consultation with Tauro, J., the motion for relief from judgment is denied.

FREEDMAN, J.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS.

[Title omitted in printing.]

Defendant's Motion for Reconsideration of his Prior Motions

(1) To Stay Judgment Pursuant to Supreme Court Rule 18; (2) To Modify Judgment Pursuant to F.R.Civ.P. 60(b)(6).

The defendant Massachusetts Registrar of Motor Vehicles moves that the court reconsider his prior Motion (1) To Stay Judgment Pursuant to Supreme Court Rule 18; (2) To Modify Judgment Pursuant to F.R.Civ.P. 60(b)(6).

As reason therefor he relies upon the intervening decision of *Dixon v. Love*, 45 LW 4447, rendered by the Supreme Court on May 16, 1977 in a case analogous to the present action. The defendant discusses the Supreme Court's analysis more fully in a Supplemental Memorandum of Law filed simultaneously with this Motion.

By his attorneys,

STEVEN A. RUSCONI,
MITCHELL J. SIKORA, JR.,
Assistant Attorneys General.

Docketed June 1, 1977, 5:13 P.M.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS.

No. CA 76-2560-F.

DONALD E. MONTRYM, INDIVIDUALLY AND
ON BEHALF OF ALL OTHERS
SIMILARLY SITUATED

v.

ROBERT A. PANORA, REGISTRAR OF MOTOR
VEHICLES, AND HIS SUCCESSORS IN OFFICE

October 6, 1977.

Motion to stay and modify judgment denied.

Levin H. Campbell, Circuit Judge, dissented and filed
opinion.

Robert W. Hagopian, Cambridge, Mass., for plaintiff.
Steven A. Rusconi, Asst. Atty. Gen., Boston, Mass., for
defendant.

Memorandum.

Before CAMPBELL, Circuit Judge and FREEDMAN, and
TAURO, District Judges.

TAURO, District Judge.

Defendant Registrar of Motor Vehicles has moved this court to reconsider its denial of his earlier motions to stay or modify the judgment entered against him by this court on May 4, 1977 in accordance with the opinion issued on March 25, 1977, 429 F.Supp. 393. He relies primarily upon the recent Supreme Court case of *Dixon v. Love*, 431 U.S. 105, 97 S.Ct. 1723, 52 L.Ed.2d 172 (1977). In that case, the Court upheld the provision of the Illinois Driver Licensing Law which empowers the Secretary of State to suspend or revoke, without a preliminary hearing, a license of a driver who had repeatedly been convicted for traffic offenses.

The plaintiff argues, and this court agrees, that several critical factors distinguish *Love* from this case. The significance of these distinguishing factors becomes apparent when they are analyzed in terms of the three prong test of *Mathews v. Eldridge*, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976) which requires consideration of:

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

424 U.S. at 335, 96 S.Ct. at 903.

First, the private interest here is greater than that at stake in *Love*. There, the Court emphasized that the challenged Illinois statute allowed a person, upon notification of suspension or revocation, to request emergency relief in the form of a restricted permit. Ill. Ann. Stat. c. 95½ §§ 6-206(c)3 and (c)2.¹ The opportunity for such relief was a controlling factor in the Court's decision.

¹Under the Illinois scheme, a commercial driver whose license has been suspended may submit an affidavit setting forth the facts of his employment and the number of offenses committed while driving a commercial vehicle. Upon receipt of the affidavit and the driver's license, the Secretary shall "thereupon send to said driver a permit to drive a commercial vehicle in his regular occupation." Alternatively, the commercial driver may seek a hearing. Ill. Ann. Stat. c. 95½ § 6-206(c)2. Consequently, the potential for commercial loss is considerably less than in Massachusetts.

The statutory scheme for the granting of hardship permits is somewhat more ambiguous. It is not clear whether the Secretary may consider and grant a limited license to prevent undue hardship prior to the hearing permitted by Ill. Ann. Stat. c. 95½ § 2-118, or only subsequent to such a hearing. § 6-206(c)3. While our dissenting brother believes that the hardship application may be made and considered only subsequent to a hearing, the Court's opinion in *Love*, supra, suggests that the hardship application may be considered prior to hearing. 431 U.S. 105, 97 S.Ct. 1723.

In view of the issue before the Supreme Court in *Love*, it is logical to conclude that consideration of what occurs after the post evidentiary hearing (under Ill. Ann. Stat. c. 95½ § 2-118) would be irrelevant. Yet the Supreme Court explicitly referred to the special provisions for holders of commercial licenses and for hardship cases, as indicated in the passage quoted above in the text, when it enumerated those factors which led the Court to conclude that the nature of the right involved in *Love* did not require an evidentiary hearing prior to license suspension or revocation.

Judge Campbell's references to stipulated facts in footnote 3 and throughout his dissenting opinion are troublesome. Our understanding is that defendant's proposed stipulation of facts was not executed by the plaintiff.

The private interest affected by the decision here is the granted license to operate a motor vehicle. Unlike the social security recipients in *Eldridge*, who at least could obtain retroactive payments if their claims were subsequently sustained, a licensee is not made entirely whole if his suspension or revocation is later vacated. On the other hand, a driver's license may not be so vital and essential as are social insurance payments on which the recipient may depend for his very subsistence. See *Goldberg v. Kelly*, 397 U.S. 254, 264, 90 S.Ct. 1011, 1018, 25 L.Ed.2d 287 (1970). The Illinois statute includes special provisions for hardship and for holders of commercial licenses, who are those most likely to be affected by the deprivation of driving privileges. See n. 7, supra. We therefore conclude that the nature of the private interest here is not so great as to require us "to depart from the ordinary principle, established by our decisions, that something less than an evidentiary hearing is sufficient prior to adverse administrative action." *Mathews v. Eldridge*, 424 U.S., at 343, 96 S.Ct. [893] at 907. See *Arnett v. Kennedy*, 416 U.S. 134, 94 S.Ct. 1633, 40 L.Ed.2d 15 (1974).

431 U.S. at 113, 97 S.Ct. at 1728.

There is no comparable safeguard in the challenged Massachusetts statute. See Mass. Gen. Laws ch. 90, § 24(1)(f). We recognize that there is a statutory provision for a hearing at the time of the license surrender. Mass. Gen. Laws ch. 90, § 24(1)(g). But, as we pointed out in our prior opinion, such hearings are likely to be delayed with the consequence that the license remains suspended for a period of time without there being any available procedure for seeking emergency relief. Opinion 429 F.Supp. at 397, n. 11 and

400.² Unlike the situation in *Love*, Massachusetts provides no opportunity for emergency relief prior to a hearing. Hence the potential for irreparable personal and economic hardship is far greater in Massachusetts than in Illinois.

²In his dissenting opinion Judge Campbell states that . . . "Massachusetts provides for a full hearing commencing, though not necessarily ending, the very same day the license is surrendered." The fact is that hearings are rarely, if ever, held on the day the license is surrendered. Both parties acknowledged at oral argument that any factual dispute would make it impossible to hold an immediate hearing. The only matter reviewable on the day of surrender would be whether there was something defective on the face of the report of refusal form. Factual disputes, such as those underlying the instant case, would require the hearing to be postponed for some unpredictable period until the police and other witnesses would be available.

If a Massachusetts licensee were at least given a "same day" opportunity to make a pre-hearing request for emergency relief, the existing constitutional defect would be cured. No evidence would need to be taken at this "same day" hearing. All that need be provided would be an opportunity to alert the registrar to facts which might cause him, in his discretion, to hold up suspension until an evidentiary hearing could be held. Under the existing statutory scheme he has no such discretion.

Indeed, such an approach would be consistent with Judge Campbell's comments at hearing.

"It seems to me if you provided that the Registrar send a letter out to the fellow saying, 'I am going to take your license away if you refuse. If you want a hearing on this, you will have to ask for one in the next five days. Otherwise, your license is suspended.' I would think in most instances where there was no real dispute about it *that would give someone an opportunity, if he had a situation like this plaintiff, to bring it to the attention of the Registrar.*" (Emphasis supplied.) Transcript p. 30.

"Well, my feeling would be that at the time this hearing is held, where the fellow has turned in his license, the hearing officer might hold up the suspension until the witnesses came in. If a different story is told then, then the Registrar might say, 'all right. Hold up the suspension for ten days until I get to the bottom of this.'" Transcript p. 39.

We feel that these comments of Judge Campbell are right on the mark and, if adopted by the Commonwealth, would provide those in the position of the plaintiff with a constitutionally adequate procedure for seeking relief.

[1] Contrary to the interpretation advanced by the defendant, our prior opinion does not require that the Registrar provide opportunity for a pre-suspension evidentiary hearing. Rather, we required that some opportunity to be heard be provided a licensee prior to suspension. The opportunity need not be a formal hearing, but must at a minimum give the licensee a chance to alert the Registrar to the possibility that suspension is unwarranted and would be unjust. As *Love* recognized, Illinois has made special provision for hardship situations. The lack of such opportunity in Massachusetts is critical.

[2] *Second*, the risk of error under the Illinois scheme is markedly less than under the Massachusetts procedure. The revocation decision in Illinois is based on a series of criminal convictions. As Justice Blackmun pointed out, the licensee "had the opportunity for a full judicial hearing in connection with each of the traffic convictions on which the Secretary's decision was based." 431 U.S. at 113, 97 S.Ct. at 1728. To be sure, there is some risk of human error in Illinois' reliance on criminal record keeping. Yet that risk is insignificant. In contrast, under the Massachusetts procedure, the Registrar's decision is based solely on a form affidavit which the licensee has no opportunity to rebut. The licensee does not have an opportunity to be heard with regard to any of the three factual findings required to be made as a basis for the revocation of his license.³

According to the concurring opinion of Justice Stevens, the Supreme Court was not rejecting the constitutional

³As we pointed out in our original opinion, the arresting officer must attest to three matters: that the licensee was arrested; that the officer had reasonable grounds for believing that the person had been operating a motor vehicle while under the influence of intoxicating liquor; and that the person refused to submit to a breathalyzer test after being informed that his license would be suspended as a result of such a refusal. Opinion 429 F.Supp. at 394, n. 1.

analysis of the District Court in *Love*. His opinion indicates that an ex parte suspension or revocation of a license, based on subjective factors, may not be constitutionally permissible. The inference seems to be that summary action is constitutionally permissible only when it is based on facts that are objectively ascertainable. We respectfully disagree with our brother that the three issues which must be set forth in the police officer's affidavit amount to "a simple, objectively-ascertainable event: i.e., a refusal to take a chemical or breath test. . . ." The facts of this case demonstrate that the contrary is true. Here, plaintiff claims he was willing to take the breath test but the opportunity to do so was denied him. The findings of the state judge support his contention. "Breathalyzer refused when requested within one half hour of being at the police station. See attached affidavit and memorandum. Smith." The action was dismissed. Transcript at p. 5. Judge Campbell's query as to whether plaintiff's conduct at the police station "qualifies as a refusal" ignores the state court's finding that the plaintiff was refused the opportunity to take the test, not the other way around. The licensee in Massachusetts is not only presumed to be in violation of the statute, but is required to suffer the adverse consequences of such presumed violation without any opportunity to be heard.⁴ The challenged Massachusetts procedure is simply not comparable to that approved in *Love*.

Finally, nothing in our opinion burdens the Commonwealth's valid interest in removing unsafe drivers from the

⁴Moreover, we cannot agree with Judge Campbell's conclusion that . . . "it is hard to imagine a sober driver refusing to take the test whether or not there was cause for his arrest. . . ." The negative inference he draws is a little too close to that too often drawn by lay persons willing to assume that one who relies on Fifth Amendment rights must be guilty of something.

highway. Regardless of the challenged statute, a positive breathalyzer test does not automatically remove the chronic drunk driver from the road. He may continue to drive until he is duly convicted.⁵ Indeed, in the Registrar's discretion, a conviction of drunk driving need not lead to license revocation. Providing an opportunity to be heard prior to automatic suspension for refusal to take a breathalyzer test — the sole effect of our opinion — does not offend the state interest in safe highways. We conclude that our evaluation, of the Governmental interest at stake here, 429 F.Supp. at 399-400, is unaffected by *Love*.

Accordingly, the court declines to modify its judgment as a result of the opinion in *Love*. An order will issue.

LEVIN H. CAMPBELL, Circuit Judge (dissenting).

I disagree with my colleagues' judgment that this case is substantially distinguishable from *Dixon v. Love*, 431 U.S. 105, 97 S.Ct. 1723, 52 L.Ed.2d 172 (1977). In that case the Court upheld the Illinois Driver Licensing Law which, under "point system" regulations adopted in Illinois by the Secretary of State, called for immediate suspension without prior hearing of the licenses of those whose licenses had already been suspended for moving vehicle violations on three occasions within ten years. In the present case we are confronted with a Massachusetts law which, in order to compel those arrested for drunken driving to take an im-

⁵In contrast to the Illinois statute, the Massachusetts statute does not directly enhance highway safety. The Illinois statutory provision which was upheld in *Love* was designed to remove drivers from the road who had been repeatedly convicted for traffic offenses. 431 U.S. 105, 97 S.Ct. 1723. Under the Massachusetts statutory scheme, summary license suspension is not based on any judicial determination of a driver's danger to the public. Rather, as noted above, it occurs solely because the motorist, whether drunk or sober, refuses to take a chemical test.

mediate chemical or breath test, penalizes the refusal to take such a test by a 90-day license suspension. Like the Illinois law, the Massachusetts law calls for a suspension only upon the occurrence of a simple, objectively-ascertainable event: i.e., a refusal to take a chemical or breath test, as certified to under penalties of perjury by the officer witnessing the refusal. And, going beyond any safeguards in the Illinois law, Massachusetts provides for a full hearing commencing, though not necessarily ending, the very same day the license is surrendered.¹

¹My brothers, while agreeing that there is provision for an immediate hearing with counsel at the time of the license surrender (see Note 11 of the court's opinion written by Judge Freedman and concurred in by Judge Tauro), now assert that "hearings are rarely if ever held on the day the license is surrendered". They apparently base this assertion on the fact that if testimony has to be taken, the hearing will be continued until the presence of necessary witnesses, such as the police officers, can be secured. But postponing the evidentiary part of the hearing does not alter the fact that a non-evidentiary hearing, with counsel, is available to the licensee on the same day the license is surrendered. (See Note 11 of my brothers' main opinion, which the transcript fully supports.) As Mr. Hagopian, plaintiff's attorney stated, "If you walk into the Registry down there with your license and give it to the Registrar, you get a hearing right away." (Tr. 11.) "[A]s I understand the statutory procedure, under § (g) you can get an immediate hearing before the Registrar." (Tr. 14.) Mr. Hagopian's objection to this procedure (besides the fact that it comes, in his view, too late) is that so much of the hearing as is available on the day the license is surrendered is non-evidentiary. He argues, "You are not going to get your license back that day if you contest the factual issues unless there is something defective upon the face of the affidavit or report of refusal form." Still, the opportunity to appear before the Registrar's delegate with counsel is nonetheless a "hearing", albeit a non-evidentiary one, affording the license holder an opportunity to point out errors to the Registrar which do not require the taking of evidence to resolve. And while there is no evidence as to when in time the opportunity to present testimony in the continued proceeding may normally be expected, there is no reason to assume that this will not occur with reasonable expedition, depending

It was stipulated^{1a} that of 884 traffic fatalities in Massachusetts in 1975, 283 resulted from accidents in which alcohol was determined as the attributing cause. It was further stipulated that approximately 300 people were refusing to submit to breath analyses tests in Massachusetts every month. Given the state's compelling interest in lessening the carnage on its highways caused by intoxicated drivers, and given also the statute's minimal restrictions on personal liberties, I can see no basis whatever for declaring it unconstitutional. Under *Love and Mathews v. Eldridge*, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976), I would vacate the injunction and dismiss the complaint.

My colleagues make much of the reference in *Love* to a special provision for hardship and for holders of commercial licenses.² Since plaintiff is not a commercial licensee the

upon the availability of witnesses, the schedule of the hearing officer, and the usual considerations that affect the holding of hearings of this nature.

^{1a} Although plaintiff did not execute the stipulations as to facts, Mr. Hagopian stated, in response to my query as to whether there was an agreed statement of facts, "That is correct." (Tr. 3.)

² Under the Illinois law and regulation, commercial licensees are allowed 5 rather than 3 offenses before mandatory suspension. Eligibility for relief under that section is not automatic, but requires the commercial driver whose license "is suspended", *Dixon v. Love*, 431 U.S. 105, note 7, 97 S.Ct. 1723, 52 L.Ed. 2d 172 (1977), to establish eligibility after surrendering his license. Illinois law also allows any driver whose license is suspended or revoked to apply for a restricted hardship permit to drive between his residence and his place of employment or within other proper limits, but only at the end of a post-suspension review proceeding which occurs only "as early as practical" after the already suspended licensee has requested it. *Id.*; see Ill. Ann. Stat. ch. 95½, § 6-206(c)(3) (Smith-Hurd Supp. 1977). My colleagues are thus in my view mistaken in their statement, "Unlike the situation in *Dixon*, Massachusetts provides no opportunity for emergency relief prior to suspension." Massachusetts provides no such opportunity, but neither does Illinois.

latter is inapposite, but he would, in the Illinois scheme, once his license was suspended, be eligible, as under Massachusetts law he is not, to apply for a limited hardship permit.

There are two answers to this attempted distinction. First, Massachusetts, unlike Illinois,³ affords a licensee a hearing commencing the very day he surrenders his license. To be sure, if witnesses are required, a continuance may be needed to bring in the material witnesses, but if the issue can be resolved without witnesses it can be disposed of the same day, and, if not, there is no reason to suppose that the taking of evidence will not proceed with reasonable dispatch. In Illinois, on the other hand, the licensee may have to wait for some time after suspension of his license for a hearing. His only opportunity is to apply after suspension for a hardship permit (the consideration and granting of which may, presumably, take some time). In Massachu-

³Under the Illinois plan, the suspended licensee was only entitled to a hearing "as early as practical" within 20 days after requesting one. In Massachusetts, by contrast, a hearing, with attorney present, is available commencing immediately (see note 1). At such a hearing, according to the stipulated facts, "the hearing officer examines the Report of Refusal to Submit to Chemical Test to determine that it is complete and complies with the requirements of Ch. 90 § 24(1)(f). If the Report is not complete or does not comply, the hearing officer returns the driver's license in hand to the licensee. If the Report is complete and complies, the burden is on the licensee to show that one of the factual issues set forth in Ch. 90 § 24(1)(g) was in the negative, i. e., there was no probable cause, no arrest, or no refusal to submit. The hearing officer will adjourn the hearing at his own request, or upon the request of the licensee, to permit the police officer or other witnesses to be brought in for questioning, or for counter affidavits to be submitted, or to allow the hearing officer to interview witnesses in the field.

"Witnesses at a hearing may be questioned by the hearing officer, or a licensee, or his attorney. From an adverse decision of the Registrar, a license may take an appeal to the Board of Appeals pursuant to G.L. Ch. 90 § 28."

setts, one gets a hearing commencing the same day the license is surrendered; and the features my brothers think most essential — i.e., alerting the Registrar to the possibility that suspension is unwarranted and would be unjust — can take place that very day and could, in the case of clerical or other obvious errors, result in return of the license then and there. (See Note 11, the court's opinion.) Thus to the extent the Illinois hardship provision is seen as adding to the suspended licensee's due process rights,⁴ the opportunity in Massachusetts for a hearing commencing the same day that the license is surrendered seems to me not only a fully adequate counterpart but quite possibly an improvement.

The second reason for doubting that the Illinois hardship provision adequately distinguishes *Love* is that that provision, while cited, was but one of a number of factors discussed in *Love*, and hardly the most crucial. The Court pointed out that "a driver's license may not be so vital and essential as are social insurance payments [dealt with in *Eldridge*] on which the recipient may depend for his very subsistence". *Id.* (Under *Eldridge* a social security beneficiary may be deprived of benefits for as much as a year or more while hearings take place.) The Court went on to say, "Moreover, the risk of an erroneous deprivation in the absence of a prior hearing is not great." The same is true here. The only question is the existence or non-existence of a readily observable fact. One is hard put to think of a genuine factual or legal issue which would exist in the generality of cases. To be sure, the issue plaintiff asserts here, whether an initial refusal followed by a later request to take the test qualifies as a refusal, may be the rare exception. If an arrestee can wait until his blood or breath levels

⁴I take it there is no claim that the Constitution grants any substantive right to receive a hardship driver's permit notwithstanding a refusal to submit to a chemical or breath test.

show less alcohol, the usefulness of the test is diminished; on the other hand, the Registrar or state courts may find it unreasonable for the police not to accommodate a change of heart made in good faith with reasonable promptness. Once settled, however, such a matter of statutory interpretation would be nonrecurring; and it is difficult to imagine similar issues that are likely to arise in the administration of this utterly simple statute.

To be sure, a driver might assert that the police had required the test after arresting him without cause. But it is hard to imagine a sober driver refusing to take the test whether or not there was cause for his arrest; if improperly arrested, he would take the test and sue for false arrest, not put his license in jeopardy. And if the licensee feels that he is the victim of false police affidavits, he would be raising a claim to which the Illinois point system is equally vulnerable. If a police officer or bureaucrat is willing deliberately to commit perjury, the citizen's ultimate recourse must be under various state and federal tort and criminal statutes. In 999 cases out of 1,000 I cannot see what there will ever be to try concerning the fact of refusal to take a chemical or blood test. And conceding that, on a rare occasion, that one meritorious case will arise, the opportunity for immediate hearing which Massachusetts affords seems to me to go far to obviate hardship.⁵ While such a rare case would

⁵The *Love* Court recognized the possibility of occasional clerical error but felt this did not outweigh the state's interest in summary procedures. Overall, the Illinois point scheme, of which *Love* upheld one small feature, is far more complicated than the very simple Massachusetts statute now before us, inviting more administrative errors. Plaintiff's claim here is not, of course, based on administrative error at all. It raises a question that plainly could not have been resolved in the simple, non-evidentiary type of presuspension hearing which is all my brothers say is constitutionally necessary before a suspension. Simple errors of the type my brothers' procedure might eliminate can be solved under the existing Massachusetts law either by informal communication between the driver and the police and/or registrar, or else at the non-evidentiary hearing available the same day the driver turns in his license.

likely involve disputed facts requiring the taking of evidence, and thus would involve surrender of the license in the interim, it does not seem unfair to require a licensee who, on the sworn affidavits of the officers has declined to take the test, to put up with that hardship. To strike the balance the other way — to permit people to litigate such an unlikely question while retaining their licenses — seems to me to impose an unfair added burden upon the society that ultimately pays both the costs of drunken driving and the salaries of the additional registry officials needed to administer a more elaborate system.

Finally, I have great difficulty with my brothers' confident assertion that "nothing in our opinion burdens the Commonwealth's valid interest in removing unsafe drivers from the highway." This may be their belief, but it clearly is not shared by the Massachusetts Legislature, the Registrar of Motor Vehicles, or the Attorney General, all of whom are charged, as the federal courts are not, with the primary duty to make this sort of judgment. As I argued in my earlier dissenting opinion, and as the *Love* Court has said,

"... the substantial public interest in administrative efficiency would be impeded by the availability of a pretermination hearing in every case. Giving licensees the choice thus automatically to obtain a delay in the effectiveness of a suspension or revocation would encourage drivers routinely to request full administrative hearings" 431 U.S. at 114, 97 S.Ct. at 1728.

My brothers seek to avoid the implications of this statement by stating that they do not require nor view as consti-

tutionally necessary "a pre-suspension evidentiary hearing". They concur with plaintiff's counsel who, in final argument, made the statement "we do not insist upon a hearing — just notice and an opportunity to respond." Plaintiff forgets, however, that in arguing the inadequacy of the hearing which the Registry offers when a licensee surrenders his license, his principal argument was that the hearing when commenced was non-evidentiary, and hence incapable of immediately resolving the factual dispute which had arisen. I suggest that a non-evidentiary pre-suspension hearing would have been totally useless to plaintiff. His case can only be resolved in light of testimony, as he seemed to concede. See note 1 *supra*. Individuals such as plaintiff who wish to assert a factually disputed claim will gain nothing from a non-evidentiary hearing. All a non-evidentiary hearing prior to suspension would do is cure simple mix-ups. But this function is perfectly well accomplished by the non-evidentiary hearing which a licensee may obtain the day he surrenders his license. What Massachusetts now provides — the opportunity for a full hearing beginning the very day the driver hands in his license — seems to me to strike a reasonable balance between the individual's interests and those of the state.

It is worth focusing, moreover, on the problem faced by Massachusetts. It is dealing with a problem — arrested drivers refusing to take the test — which even under the challenged Massachusetts system arises in that state 300 times a month. Meaningful machinery to deal with the problem has to be capable of mass administration. Intoxicated drivers can often talk their way out of a drunken driving conviction, in court, if the police do not have in hand the results of a scientific test taken at the moment of arrest. To the extent drivers are afforded increased opportunities before suspension to delay and litigate any suspen-

sion, they will be encouraged to try their chances with a refusal. Even if finally required to forego the license (for 90 days) much time will have transpired, and the state will have had to expend time and money in what in virtually all instances will be useless administrative proceedings invoked simply to buy time or in the hope that something favorable will turn up.

I think that Massachusetts could rationally determine that the procedure in question was the most practical and effective one. The non-evidentiary pre-suspension hearing my brothers seem to require will add no measurable protection to the present system; if, on the other hand, they mean to require a hearing that will enable the Registrar to delay suspension until after investigation into contested facts, they are proposing something which will constitute a serious encumbrance. Since the present system is fundamentally fair, since it is devised to deal with a problem of compelling importance to the state, since it was adopted by the people (most of whom drive) through their legislators (most of whom drive), and since the potential for hardship to an innocent person seems altogether minimal in comparison with the interests served, I think the Massachusetts law should be sustained. While there are inconsequential differences between it and the Illinois system at issue in *Love*, the principles in *Love* seem to me dispositive.

I would allow the motion for reconsideration, vacate the injunction, and dismiss the complaint.
